United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

470

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAROLD C. HINTON
VIRGINIA S. HINTON

Appellants

vs.

EVA ROBERTSON HINTON
SIDWELL FRIENDS SCHOOL

Appellees

No. 23,294

JOINT APPENDIX

INDEX TO APPENDIX

CIVIL DOCKET

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Date	Proceedings	
1967		
June 21	Complaint, appearance	
June 21	Summons, copies (2) and copies (2) of Complaint issued. D#1 Ser. 6/22/67, D#2 Ser. 6/27/67	
June 21	Motion for Preliminary Injunction. MC	Filed
June 29	Answer of deft #1 to motion for preliminary injunction. c/m 6/29/67.	filed
July 5	Reply affidavit of pltf#1 in support of motion for preliminary injunction; P & A; c/m 7/5/67	
July 7	Answer of deft #2 to complaint; appearance of Dickson R. Loos as atty for deft #2; c/m 7/7/67	
July 11	Order denying motion for preliminary injunction. (N)	Waddy, J.
July 14	Answer of deft #1 to complaint; appearance of William P. MacCracken, Jr., c/m 7/11/67	filed
Sept 21	Notice of pltfs to take deposition of deft #1; c/m 9/20/67	filed
Sept 27	Notice of pltfs to take deposition of deft #1; c/m 9/26/67	filed
1968		
Feb 5	Motion of pltfs to compel deft to answer questions on deposition and for costs and attorney fees; c/m 2-5-68; M.C.	filed
Feb 12	Answer of deft #1 to question in connection with taking her deposition; c/m 2-9-68.	filed
Feb 29	Order denying motion for costs and attorney fees. (N)	McGuire, J.
Mar 25	Dismissed for want of Prosecution	Pretrial Examiner
Mar 25	Order dismissing for Want of Prosecution AC/N (N)	GESELL, J
Apr 2	Motion of pltfs to vacate dismissal and to reinstate cause; c/m 4-2-68; M.C.	filed
Apr 29	Order reinstating cause (N) AC/N	Curran, C.J.
May 2	Notice of deft #2 to take deposition of Frank Mills. c/m 5/2/68	filed
May 3	Notice of deft #1 to take deposition of Frank Mills; c/m 5/2/68	filed
July 18	Deposition of Frank Mills by deft.	filed
Aug 2	Deposition of Eva R. Hinton for pltfs.	filed
Oct 24	Called	Assistant Pretrial Examiner
Oct 24	Certificate of Readiness by pltfs; c/m 10.24/68	filed
1969		
Mar 19	Joint motion of defts for summary judgment; Statement; P&A; c/m 2/18/69 M.C.	filed
Mar 25	Opposition of pltff. to motion for summary judgment; P&A; Statement c/m 3/24/69	
Apr 25	Motion for Summary Judgment argued and taken under advisement (Rep: Doyne Spencer)	Robinson, J.
Apr 29	Supplemental P&A of pltfs, Exhibit c/m 4/29/69	filed
May 6	Memorandum of deft in reply to supplemental P&A; c/m 4/30/69	filed
May 12	Motion of pltfs for leave to file amended complaint; P&A; c/m 5/12/69 M.C.	filed
May 13	Opposition of Deft #2 to motion for leave to file amended complaint; c/m 5/13/69	
May 14	Order granting joint motions of defts. for summary judgment and dismissing complaint with prejudice (N) (signed 5/9/69	Robinson, J.
May 22	Motion of Pltfs for relief Rule 60 (B) c/m 5/19/69 M.C.	filed
May 22	Opposition of deft Sidwell Friends School to motion for relief under Rule 60 (B) c/m 5/22/69	
June 9	Order denying Pltfs' motion for relief under Rule 60 (b) (6), FRCP. (N).	ROBINSON, J.
June 12	Notice of appeal by pltfs from orders of 5/14/69 and 6/9/69; copies mailed to D. Loos and W. P. MacCracken. Deposit $ 5.00 by Dostert	
June 10	Order denying motion of pltf. for relief under Rule 60(b) (N)	Robinson, J.
June 10	Cost bond on appeal of pltffs in sum of $ 250.00 with Hartford Accident and Indemnity Co., approved	Corcoran, J.
July 22	Record on Appeal delivered to USCA; deposit by Piere E. Dostert $ 1.10	filed.
July 22	Receipt from USCA for original papers.	

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD C. HINTON
VIRGINIA S. HINTON
5806 Warwick Place
Chevy Chase, Maryland

Plaintiffs

vs.

1580-67

Civil Action No. _____

EVA ROBERTSON HINTON
1425 34th Street, N.W.
Washington, D. C.

SIDWELL FRIENDS SCHOOL
a District of Columbia Corporation
3825 Wisconsin Avenue, N.W.
Washington, D. C.

Defendants

COMPLAINT
(Alienation of Affections, Conspiracy, and for Injunctive Relief)

COUNT ONE
(Complaint for Alienation of Affection)

Jurisdiction of this Court is vested since the amount in controversy exceeds $10,000.00, exclusive of interest and costs. The plaintiffs are residents of the State of Maryland. The defendant, Eva R. Hinton, is an adult residing in the District of Columbia. The defendant, Sidwell Friends School, is a corporation organized under the laws of the District of Columbia.

1. The plaintiffs are husband and wife. As a result of the marriage of the plaintiffs, there was born to them on September 28, 1949, John Robertson Hinton, said child being now seventeen years of age.

2. Said minor, John Robertson Hinton, was enrolled by his parents in Sidwell Friends School in September, 1963, and has been a student there during the past four school years.

3. On or about November 27, 1965, the said minor moved temporarily from the family residence at 5603 Warwick Place, Chevy Chase, Maryland, to live temporarily at the residence of defendant Eva R. Hinton, said minor's paternal grandmother, because plaintiff Virginia S. Hinton was ill at the time.

4. In February, 1966, plaintiffs instructed their minor child to return to the family residence. This the child refused to do and since that time defendant Eva R. Hinton has wrongfully and unlawfully harbored the minor child at her residence, and has aided and abetted the delinquent refusal of the minor child to obey his lawful parents.

5. In an effort solely designed to regain control of the said minor, plaintiffs on September 14, 1966, instructed defendant Sidwell Friends School not to permit the attendance of the minor child at the school for the 1966-1967 school term, unless and until the minor child returned to plaintiffs' home.

6. Despite these specific instructions, Eva R. Hinton in conjunction with the Sidwell Friends School authorities, arranged for the minor's continued attendance at the school, while he continued to unlawfully reside at the home of defendant, Eva R. Hinton.

7. At the suggestion of Sidwell Friends School, defendant, Eva R. Hinton filed an action for Custody (D 2815-66) of said minor child on September 20, 1966. This suggestion was made solely to justify said minor's continued attendance at Sidwell Friends School.

8. There has been no order of any court, pendente lite or permanently awarding custody of the minor child to defendant Eva R. Hinton, and at no time has said defendant been the legal custodian of the minor child in the past.

9. In March 1967, the plaintiffs learned that said minor child had, on September 14, 1966, been examined by a physician, without the consent, expressed or implied, of his parents. This examination had been procurred at the request of Sidwell Friends School prior to his admission to that institution for the 1966-1967 school year, and was performed by a physician who is a member of the Board of Trustees of Sidwell Friends School.

10. Prior to the time that said minor child commenced living with the defendant, Eva R. Hinton, special medical care had been deemed necessary by the family physician for his continued physical and mental wellbeing. The plaintiffs have

been unable to obtain any information relating to current treatment of said minor child.

11. On March 24, 1967, plaintiffs through their attorney, demanded that Sidwell Friends School furnish the name of the physician who made the examination. Neither the defendant School nor Eva R. Hinton were willing to disclose this information, the latter upon the advice of their general counsel that such information is confidential should not be made available to anyone other than school authorities, and that such information was confidential even as to the parents of the minor child, who had not authorized its procurement in the first place. Counsel for the defendant school also advised the plaintiff that the minor and his unlawful custodian objected to the use of this information as confidential, and that it was at their objection that the school refused to reveal the necessary information.

12. On June 1, 1967, plaintiffs through their attorney, notified the defendant school that inasmuch as no order of custody, either pendente lite or permanent, had been issued, that the pending custody proceeding was being contested on the grounds that the court hearing the case had no jurisdiction, that no action had been taken in any forum which effected a change in plaintiffs' status as the legal custodians of their minor son and that, therefore, they directed that the Sidwell Friends School refrain from either issuing a diploma to said minor or from releasing his academic record to any institution of higher learning unless and until plaintiffs authorized such action. Defendant Sidwell Friends School has refused to act upon this request and did award the diploma to plaintiffs' minor son.

13. But for the alleged acts of the defendants, and other acts of both Eva R. Hinton and the Sidwell Friends School, the plaintiffs would have been in the past and would now be enjoying the natural love, affection and harmonious family relationship with their minor son.

14. That the above alleged acts and other acts of Eva R. Hinton and the Sidwell Friends School were done maliciously, in willful and wanton disregard

of natural feelings of love and affection flowing between the plaintiffs and their child and were performed in a grossly wanton and reckless manner.

COUNT TWO
(Conspiracy to Alienate Affections)

1. Plaintiffsreallege facts set forth in paragraphs 1 — 14 of the first count of this complaint.

2. In doing the above alleged acts and other acts, the defendants Eva R. Hinton and Sidwell Friends School did actively conspire with each other and in combination with each other did act to alienate the affections of the plaintiffs' minor son from his parents.

COUNT THREE
(Injunctive Relief Against Defendant Eva R. Hinton)

1. Plaintiffs realliege facts set forth in paragraphs 1 — 14 of the first count of this complaint.

2. The continued acts of the defendant Eva R. Hinton will result in irreparable damage to the plaintiffs.

3. There is no adequate remedy at law for the damages resulting from the continued acts of the defendant Eva R. Hinton in further alienating the affections of the said minor son from his parents.

WHEREFORE, the premises considered, plaintiffs pray the relief of this Honorable Court as follows:

1. Compensatory and punitive damages in the amount to Two Hundred Thousand ($200.000.00) Dollars on Counts One (1) and Two (2) of this Complaint, against both defendants, Eva R. Hinton and Sidwell Friends School, jointly and severally.

2. The issuance of a preliminary and permanent injunction restraining defendant Eva R. Hinton from doing any act whatsoever that would tend to interfere with the legal right of the plaintiffs to the custody of their minor son.

/s/
HAROLD C. HINTON
5806 Warwick Place
Chevy Chase, Maryland

/s/
VIRGINIA S. HINTON
5806 Warwick Place
Chevy Chase, Maryland

Pierre E. Dostert
PIERRE E. DOSTERT
BORZILLERI & DOSTERT
Attorneys for Plaintiffs
833 17th Street, N.W.
Washington, D. C. 20006
298-9233

DISTRICT OF COLUMBIA, SS:

HAROLD C. HINTON, being duly sworn on oath, deposes and states that he has read the foregoing complaint by him subscribed and knows the content thereof; that the matters and things stated therein of his personal knowledge are true and those stated upon information and belief he verily believes true.

/s/
HAROLD C. HINTON

Subscribed and sworn to before me this 20th day of June, 1967.

/s/
NOTARY PUBLIC, D.C.
My Commission expires:

DISTRICT OF COLUMBIA, SS:

VIRGINIA S. HINTON, being duly sworn on oath, deposes and states that she has read the foregoing complaint by her subscribed and knows the contents thereof; that the matters and things stated therein of her personal knowledge are true and those stated upon information and belief she verily believes true.

/s/

VIRGINIA S. HINTON

Subscribed and sworn to before me this 20th day of June, 1967.

/s/

NOTARY PUBLIC, D..C.
My Commission expires:

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

HAROLD C. HINTON, ET AL.,	)	
Plaintiffs,	)	Civil Action No. 1580-67
vs.	)	
EVA ROBERTSON HINTON, ET AL.,	)	
Defendants.	)	

ANSWER OF DEFENDANT, EVA ROBERTSON HINTON

COUNT ONE

FIRST DEFENSE: Count One of the Complaint fails to state a cause of action against this defendant upon which relief may be granted.

SECOND DEFENSE:

1. Defendant admits the allegation of paragraph 1 of the Complaint.

2. Defendant admits the allegations of paragraph 2 of the Complaint.

3. Defendant admits that on or about November 27, 1965 the minor, JOHN R. HINTON, came to live with her of his own volition, and that subsequently the plaintiffs requested this defendant to permit their son to live with her.

4. The defendant has no knowledge of any instructions which the plaintiffs may have given their son in February 1966, and states that during that month plaintiff, VIRGINIA S. HINTON, was in Europe and that plaintiff, HAROLD C. HINTON, did not, at any time during the month of February 1966, advise this defendant that he had instructed his son to return home. This defendant denies that her said grandson is a delinquent and alleges that

his living with her since November 27, 1965 is in the best interest of said minor.

5. This defendant has no knowledge regarding the alleged instructions given to Sidwell Friends School and therefore denies the same.

6. The allegations as stated in paragraph 6 of the Complaint are denied by this defendant.

7. Defendant admits that on the advice of her counsel on or about September 20, 1966 she filed an action for custody of her said grandson in the Domestic Relations Branch of the District of Columbia Court of General Sessions (D-2815-66) in which action the plaintiffs appeared and challenged the jurisdiction of said court. An Order was entered in said proceeding sustaining the jurisdiction of the court and the case is still pending. Defendant further states that as early as May of 1966 she had applied to Sidwell Friends School on behalf of her grandson to secure a scholarship for the school year of 1966-1967 and that on numerous occasions prior to filing said custody suit her grandson had requested her to take such action. Defendant denies that the defendant, Sidwell Friends School, requested her to file said custody action.

8. The defendant admits that there has been no order of any court pendente lite or permanently awarding custody of her grandson to her, and states that she was given the legal custody of her grandson by his parents when they went to Europe in December of 1965.

9. The allegations as stated in paragraph 9 of the Complaint are denied by this defendant.

10. Defendant denies the allegations of paragraph 10 of the Complaint and further states that her said grandson is in

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excellent physical and mental health.

11. This defendant has no knowledge of the plaintiffs' alleged demand upon the defendant, Sidwell Friends School, and therefore denies the allegations of paragraph 11.

12. This defendant has no knowledge of the plaintiffs' alleged demand upon the defendant, Sidwell Friends School, but admits that said school did award a diploma to her grandson. This defendant also admits that the plaintiffs contested the custody proceeding on the ground that the court where it was pending had no jurisdiction and states that plaintiffs' motion to dismiss the custody proceeding was denied.

13. The allegations of paragraph 13 of the Complaint are denied by this defendant.

14. The allegations of paragraph 14 of the Complaint are denied by this defendant.

15. Defendant denies all other allegations of the Complaint not hereinbefore admitted.

COUNT TWO

FIRST DEFENSE: The allegations contained in Count Two of the Complaint fail to state a claim against this defendant upon which relief can be granted.

SECOND DEFENSE: Defendant denies each and every allegation contained in Count Two of the Complaint except those expressly admitted hereinbefore.

COUNT THREE

FIRST DEFENSE: The allegations contained in Count Three of the Complaint fail to state a claim for injunctive relief against this defendant, and states that plaintiffs' motion for a preliminary injunction has been denied.

SECOND DEFENSE: Defendant denies each and every allegation contained in Count Three of the Complaint except those expressly admitted hereinbefore.

WHEREFORE, the premises considered, defendant prays that this Complaint be dismissed with prejudice and that costs of this action be assessed against plaintiffs.

William P. MacCracken, Jr.

William P. MacCracken, Jr.,
Attorney for defendant,
Eva Robertson Hinton
1000 Connecticut Avenue, N. W.
Washington, D. C. 20036
Telephone: 296-5494

I hereby certify that copies of the foregoing Answer were served this 11th day of July, 1967, by mail, postage prepaid, on Pierre E. Dostert, Esquire, 888 17th Street, N. W., Washington, D. C., 20006, and on Dickson R. Loos, Esquire, 888 17th Street, N.W., Washington, D. C. 20006.

William P. MacCracken, Jr.

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

HAROLD C. HINTON, ET.AL.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Civil Action No. 1580-67
	)	
EVA ROBERTSON HINTON, SIDWELL FRIENDS SCHOOL,	)	
	)	
Defendants.	)	

ANSWER OF DEFENDANT SIDWELL FRIENDS SCHOOL

Count I

First Defense

Count I of the complaint fails to state a cause of action against this defendant upon which relief may be granted.

Second Defense

1. Defendant admits the allegations of paragraph numbered one of the complaint.

2. By way of answer to paragraph 2 of the complaint, defendant admits that John Robertson Hinton has been a student at Sidwell Friends School for the past four years.

3. Defendant has no knowledge concerning the allegations in paragraph numbered three of the complaint and therefore denies such allegations.

4. Defendant has no knowledge regarding the allegations of paragraph four of the complaint and therefore denies such allegations.

5. The allegations as stated in paragraph five are denied.

6. The allegations of paragraph six of the complaint are denied.

7. The allegations of paragraph seven of the complaint are denied.

8. Defendant knows of no order of Court awarding custody to defendant Eva Hinton and has no knowledge of the remaining allegations of paragraph eight of the complaint and therefore denies such allegation.

9. The allegations as stated in paragraph 9 of the complaint are denied. By way of further answer, this defendant states that its regulations require a physical examination and the minor, John Hinton underwent such an examination.

10. Defendant has no knowledge of the allegations of paragraph ten of the complaint and therefore denies such allegations.

11. Defendant denies the allegations of paragraph eleven.

12. Defendant admits that plaintiffs directed the school not to issue a diploma to the minor child and directed that the school not release his academic records to any college. Defendant admits that it did issue a diploma to the child. The other allegations of paragraph twelve are denied.

13. The allegations of paragraph thirteen of the complaint are denied.

14. The allegations of paragraph fourteen are denied.

15. Defendant denies all other allegations of the complaint not hereinbefore admitted.

Count Two

1. The allegations contained in count two of the complaint fail to state a claim against this defendant upon which relief can be granted.

2. Defendant denies each and every allegation contained in count two of the complaint except those expressly admitted hereinbefore.

WHEREFORE, the premises considered, defendant prays that this complaint be dismissed with prejudice and that costs of this action be assessed against plaintiffs.

Dickson R. Loos
Attorney for Defendant
888 17th Street N.W.
Washington, D.C. 20006

CERTIFICATE OF SERVICE

I certify that copies of the foregoing answer were served this _____day of July, 1967 by mail, postage prepaid, on Pierre Dostert, Esq. 888-17th Street N.W., Washington, D.C. 20006 and on William P. MacCracken, Esq. 1000 Connecticut Avenue N.W., Washington, D.C. 20036 Attorney for defendant Eva Robertson Hinton.

Dickson R. Loos

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

HAROLD C. HINTON, VIRGINIA S. HINTON, Plaintiffs, v. EVA ROBERTSON HINTON, SIDWELL FRIENDS SCHOOL, Defendants.	: : : : : :	Civil Action No. 1580-67

JOINT MOTION OF DEFENDANTS EVA R. HINTON AND SIDWELL FRIENDS SCHOOL FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Rule 9(h) of the Rules of this Court, both defendants hereby move that this Court enter summary judgment in their favor on all counts of the complaint. In support hereof and in accordance with the Rules, defendants have attached a statement of undisputed material facts and a statement of points and authorities.

/s/ William P. MacCracken (DRL)
William P. MacCracken
1000 Connecticut Avenue, NW.
Washington, D. C. 20036

/s/ Dickson R. Loos
Dickson R. Loos
888 17th Street, NW.
Washington, D. C. 20006

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Motion were mailed to Pierre Dostert, Esquire, 888 17th Street, NW., Washington, D. C. 20006, this 15th day of March, 1969.

/s/ Dickson R. Loos
Dickson R. Loos

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

HAROLD C. HINTON,
VIRGINIA S. HINTON,

Plaintiffs,

v.

EVA ROBERTSON HINTON,
SIDWELL FRIENDS SCHOOL,

Defendants.

Civil Action No. 1580-67

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Plaintiffs are parents of John Robertson Hinton, age 19, and reside in the State of Maryland. The complaint charges defendants with alienation of affections of the minor, John Hinton.

2. Defendant, Eva Robertson Hinton, is the mother of plaintiff, Harold C. Hinton, and grandmother of the minor, John Roberison Hinton. The Sidwell Friends School is a private educational institution operating within the District of Columbia.

3. In November of 1965, plaintiffs brought John Hinton, then a student at Sidwell Friends School, to the home of defendant, Mrs. Eva Robertson Hinton, and requested that defendant permit him to live with her.

4. Prior to coming to live with defendant, the minor, John Hinton, had been under voluntary supervision of the Juvenile Court in Montgomery County and had run away from the home of his parents on several occasions.

5. Sometime in 1966 plaintiffs instructed John Hinton to return to their home. He refused. Defendant Eva Hinton did nothing to detain the said John Hinton from leaving.

6. The juvenile authorities of Montgomery County were advised that the said John Hinton had gone to live with defendant, Mrs. Eva Hinton. After investigation it was the recommendation of the juvenile authorities that it was in the minor's best interests to remain with his grandmother rather than return home.

7. In September of 1966, while the Minor, John Hinton, was residing with his grandmother, the defendant Eva Robertson Hinton, plaintiffs instructed Sidwell Friends School not to permit attendance of the minor child during the 1966-67 school term, his senior year. Accordingly, the Sidwell Friends School advised defendant, Eva Robertson Hinton, that it could not admit the said minor to the School without consent of his parents or a person having custody over said minor. Thereafter a custody suit was filed by defendant in the Domestic Relations Branch of the District of Columbia Court of General Sessions, Civil Action No. D 2815-66. Upon application by defendant, the Sidwell Friends School permitted John Hinton to attend the School subject to any further directions of the Court of General Sessions.

8. In June of 1967 plaintiffs instructed the Sidwell Friends School to refuse to issue a diploma to John Hinton although he had successfully completed his academic requirements for a diploma with honors and had been awarded a scholarship to Massachusetts Institute of Technology. The Sidwell Friends School refused to withhold the diploma and plaintiffs filed suit.

/s/ William P. MacCracken (DRL)
William P. MacCracken
Attorney for Eva Robertson Hinton

/s/ Dickson R. Loos
Dickson R. Loos
Attorney for Sidwell Friends School

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

HAROLD C. HINTON,
VIRGINIA S. HINTON,

Plaintiffs,

v. Civil Action No. 1580-67

EVA ROBERTSON HINTON,
SIDWELL FRIENDS SCHOOL,

Defendants.

POINTS AND AUTHORITIES IN SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The Undisputed Material Facts

The statement of undisputed material facts is obtained from the pleadings, the deposition of defendant, Eva Robertson Hinton, and the deposition of Frank Mills, formerly a probation officer attached to the Juvenile Court in Montgomery County at the time John Hinton was assigned for supervision. There can be no doubt that this is an unfortunate family dispute. Plaintiffs complain that defendant, Eva Hinton, did not force her grandson to leave her home. They complain that the Sidwell Friends School permitted John Hinton to attend the School for his senior year and they complain that the School awarded him a diploma. It is alleged that these actions alienated the affections of John from his parents.

It is, however, a fact that plaintiffs were unable to control their son and had sought the aid of the Juvenile Court in Montgomery County because of his running away. (Deposition of Frank Mills, p. 4-6). It is also a fact that, while living with defendant, Eva Hinton, the said minor achieved high scholastic honors and was awarded a scholarship to M. I. T. where he is now a student. (Deposition of Mrs. Eva Hinton). It is further established

through the deposition of Frank Mills, a former juvenile officer in Montgomery County, that the interests of the minor were best served by remaining with defendant, Eva Robertson Hinton. (Deposition p. 9, 20-22, 41-49).

Complaint Fails to State a Cause of Action

The basis for an action of alienation of affections is loss of consortium between husband and wife. Dodge v. Rush, 28 App. D.C. 149, 152 (1906); Albert v. McGraff, (U.S. App. D.C., 1960) 278 F.2d 16. There is no authority that parents are entitled to damages for loss of affections of a child. Furthermore, the courts in this jurisdiction have been reluctant to extend rights which arise out of the marriage relationship to children. For example, Pleasant v. Washington Sand and Gravel Company, 262 F.2d 471 (U.S. App. D.C. 1958), involved a claim on behalf of a minor child for loss of a parent's support, society, and affection during the period a parent was injured. It was argued that the claim of the child is comparable to claim for loss of consortium by a husband or wife. However, as the Court held, those cases allowing damages for loss of consortium arise out of the marriage relation. Since the child's claim does not arise from the marital relationship, it stands on a different footing and the common law recognized no enforceable right to damages for loss of personal care, affection, and companionship either against the parent who failed to give them or against the third party who caused it.

The claim of plaintiffs for alienation of affections does not arise out of the marital relationship and, without statutory authority, it cannot be maintained in this jurisdiction.

Acts Complained of are not Actionable under any Theory

Plaintiffs' case must also fail on the basis of the facts disclosed by the pleadings and depositions now on file in this case on any basis. It is evident that defendant, Eva Hinton, is no stranger or interloper who has interfered with or destroyed a family relationship. Defendant is the mother of one of the plaintiffs and the mother-in-law of the other plaintiff. The minor, whose affections were claimed to have been alienated, was brought by the parents voluntarily, to defendant. The minor had a history of running away from the control and custody of plaintiffs. It was necessary to seek help from juvenile authorities to help control him. While under the care and residing with defendant, Eva Hinton, the minor graduated from high school with honors and obtained a scholarship to a well-known university.

Similarly, the Sidwell Friends School did not seek out or entice John Hinton from his parents. They enrolled him at the Sidwell Friends School voluntarily long prior to the change of residence. During the time when John Hinton was residing with his grandmother, the School was confronted with an application from the grandmother to admit John for his final year of high school and an instruction from the parents not to admit him. Only after a suit for custody had been filed by the grandmother would the School admit John. It is the position of the School that, if their action in admitting him was in any way harmful or detrimental to anyone, they were subject to any order which the Domestic Relations Branch of the Court of General Sessions might make. None was forthcoming.

The other action complained of by plaintiffs is that the School awarded a high school diploma to the said John Hinton. To have withheld a

diploma from such a gifted scholer with opportunities for scholarship would have done him a grave injustice and subjected the School to serious questions of liability, and the School properly refused to withhold it. None of these acts amounted to wrongful alienation or enticement nor could they amount to conspiracy to alienate John from his parents. Clearly the friction which developed between John and his parents was present long before either defendant became involved with the minor. Actions by both defendants were taken in his best interests and were successful in helping the minor through a difficult period.

Conclusion

Under the circumstances, it is clear that no purpose can be served by engaging in a trial and delving into embarrassing details of the family relationship which involved supervision by the Juvenile Court of Montgomery County, several instances of running away from the home of his parents, the placement of John by his parents in the home of defendant, Eva Hinton, and the subsequent efforts of plaintifís to remove John from the home of his grandmother and to remove him from the Sidwell Friends School. The cause of action of alienation of affections does not lie in this case; the facts do not support a tort of any kind on the part of either of the defendants, and the complaint should be dismissed with prejudice against both defendants.

/s/ William P. MacCracken (DRL

William P. MacCracken
1000 Connecticut Avenue, NW.
Washington, D. C. 20036

/s/ Dickson R. Loos

Dickson R. Loos
888 17th Street, NW.
Washington, D. C. 20006

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD C. HINTON VIRGINIA S. HINTON Plaintiffs	)	
vs.	)	Civil Action No. 1580-67
EVA ROBERTSON HINTON SIDWELL FRIENDS SCHOOL Defendants	)	

OPPOSITION TO JOINT MOTION OF DEFENDANTS EVA R. HINTON AND SIDWELL FRIENDS SCHOOL FOR SUMMARY JUDGMENT

Plaintiffs oppose the Joint Motion of Defendants Eva R. Hinton and Sidwell Friedds School for Summary Judgment and state that there are many substantial material issues of fact, and that defendants are not entitled to a judgment as a matter of law.

/s/

PIERRE E. DOSTERT
Borzilleri & Dostert
888 Seventeenth Street, N.W.
Washington, D.C. 20006
298-9233

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Opposition was mailed to the following: Dickson R. Loos, Attorney for Defendant Sidwell Friends School, at 888 Seventeenth Street, N.W., and to William P. MacCracken, Attorney for Defendant Eva R. Hinton, on this 24 day of March, 1969, postage prepaid.

/s/

PIERRE E. DOSTERT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD C. HINTON VIRGINIA S. HINTON Plaintiffs vs. EVA ROBERTSON HINTON SIDWELL FRIENDS SCHOOL Defendants	)))))))	Civil Action No. 1580-67

STATEMENT OF GENUINE ISSUES

Plaintiffs, by way of reply to defendants Statement of Undisputed Material Facts, makes the following Statement of Genuine Issues, replying to each numbered statement made by defendants.

1. Undisputed.

2. Undisputed

3. Disputed. Plaintiffs brought John Hinton to the home of defendant Eva R. Hinton and requested that defendant temporarily permit him to live with her.

4. Disputed. John Hinton came under supervision of the Montgomery County Juvenile Court after he ran away in an attempt to avoid spending a summer vacation with defendant Eva R. Hinton.

5. Disputed. In early 1966 plaintiffs instructed John Hinton to return to the family home, which he refused to do. Plaintiffs requested defendant Eva R. Hinton to cease harboring John Hinton in her home which request she refused stating in effect that John Hinton could do as he wished.

6. Disputed. The case file of the Juvenile Court of Montgomery County indicated that the case of John Hinton was closed many months prior to the time he went to live temporarily with defendant Eva R. Hinton. There was no investigation by the Court. At the request of Eva R. Hinton, Frank Mills, an employee of the Court, acting as an interloper beyond the jurisdiction or proper authority of the Court, without authorization of any proper official of the Court, and solely on the basis of a few telephone

conversations with Eva R. Hinton, offered the gratuitous opinion that John Hinton should reside with Eva R. Hinton.

7. Disputed. Making further effort to re-establish the proper control and relationship of parents and child, plaintiffs instructed Sidwell Friends School not to enroll John Hinton without their permission, with the intent that such permission would readily be given upon resumption of the parent-child relationship. Sidwell Friends School, by and through its general counsel thereupon wrote a letter to defendant Eva R. Hinton by and through her attorney, stating that plaintiffs had directed that the school not enroll John Hinton; directing the attention of Eva R. Hinton to sections of the District of Columbia Code relating to custody, and stating that the school would enroll John Hinton if she filed a suit for custody and directed that he be enrolled. A suit for custody was filed within five days by Eva R. Hinton in the District of Columbia Court of General Sessions, Domestic Relations Branch, and on the same day that the suit was filed, the general counsel of Sidwell Friends School wrote to the school and advised that since custody was in litigation in Court, the School could enroll John Hinton at the request of Eva R. Hinton.

8. Disputed. In June 1967, the plaintiffs instructed that Sidwell Friends School should not issue John Hinton a diploma without their permission, intending that such permission would be readily given upon resumption of the usual parent-child control and relationship. As is well known by Sidwell Friends School, John Hinton was academically superior during the years that he lived in the family home and attended Sidwell Friends School; there was no improvement in his scholastic standing since it always had been high.

Pierre E. Dostert

PIERRE E. DOSTERT
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD C. HINTON VIRGINIA S. HINTON Plaintiffs	)	
	)	Civil Action No. 1580-67
vs.	)	
EVA ROBERTSON HINTON SIDWELL FRIENDS SCHOOL	)	
Defendants	)	

POINTS AND AUTHORITIES

I. REPLY TO STATEMENTS CONTAINED IN POINTS AND AUTHORITIES OF DEFENDANTS EVA R. HINTON AND SIDWELL FRIENDS SCHOOL

This action arises out of a family dispute which was created and compounded by defendants Eva R. Hinton and Sidwell Friends School in their actions which have alienated John Hinton from the parent-chi d relationship and control enjoyed by plaintiffs prior to the actions of Eva R. Hinton and Sidwell Friends School. Plaintiffs claim damages arising out of the fact that a frivolous custody suit was filed against them by Eva R. Hinton at the requrest of Sidwell Friends School which in so requesting suit to be filed was actively seeking to circumvent and defeat the rights of plaintiffs with respect to their son, John Hinton.

When plaintiffs instructed John Hinton to reside temporarily with Eva R. Hinton, he adamantly refused, and persisted in his refusal for two days, finally accepting the direction of his parents. His running away occurred at a time when he sought to avoid spending the summer with Eva R. Hinton at Long Island.

As has been stated, John Hinton achieved high scholastic honors prior to living with Eva R. Hinton. The conclusion of Frank Mills with respect to the best interest of John Hinton was made as an interloper without any authority of the Juvenile Court, as a result of telephone contact with Eva R. Hinton and at the request of Eva R. Hinton.

II. THE COMPLAINT STATES A CAUSE OF ACTION

A claim for alienation of affections is not limited to the marital relationship between husband and wife on the theory of loss of consortium, since loss of consortium is included in the tort of alienation of affections and is but one of the elements thereof. Eclov vs. Birdsong, 83 U.S. App. D.C. 104.

It is fundamental law that parents have a right to the services of their children, and when an infant child is injured so as to deprive the parents of the services of the minor, the parent has a right of action for such loss of services against any negligent third party.

In the case of Peall vs. Bibb, 19 U.S. Appl D.C. 311, the Circuit Court of Appeals made a clear statement of the rights of a parent with respect to his or her natural child:

> "No court can, for any but the gravest reasons, transfer a child from its natural parent to any other person . . . since the right of a parent under natural law, to establish a home and bring up children is a fundamental one and beyond the reach of any court." Meyer vs. State of Nebraska, 262 U.S. 390, 399, 43 S.C. 625, 67 L. Ed 1012.

Can it be said that Eva R. Hinton, who filed suit against jplaintiffs to deprive them of the custody of their son at the invitation of Sidwell Friends School has a greater right than a court of law? If the parents of John Hinton have the right described above, and that right is violated by the act of another, no matter what the relationship, if any, of that person may be, are the parents without remedy for this violation of their right?

Plaintiffs have tried in every conceivable manner to press the suit filed against them by Eva R. Hinton to a final trial, but without success. Eva R. Hinton has opposed each and every request for prompt hearing and trial made by plaintiffs, and the present status of the case filed by Eva R. Hinton is that the Court is prepared to dismiss the case for want of prosecution by Eva R. Hinton.

CONCLUSION

Plaintiffs were not the ones to start litigation concerning their son. Defendant Eva R. Hinton, at the request and invitation of Sidwell Friends School commenced the first legal proceedings between the parties; these proceedings have cost the plaintiffs substantial legal fees, a great deal of time and embarrassment. Defendants position that trial in this case would serve no purpose because of the possibility of delving into embarrassing details of the family felationship is without merit. Plaintiffs, in filing this action, were and are fully aware of evidence which may be introduced at trial, and if there is to be embarrassment at trial it will be on the part of the defendants rather than the plaintiffs.

Pierre E. Dostert

PIERRE E. DOSTERT
Suite 306, Drawner Building
888 17th Street, N.W.
Washington, D.C. 20006
298-9233

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed to Dickson Loos, Attorney for Sidwell Friends School, at 888 17th Street, N.W., Washington, D.C. 20006, and a copy to William P. MacCracken, Attorney for Eva R. Hinton, 1000 Connecticut Avenue, N.W., Washington, D.C. on this 24th day of March, 1969.

Pierre E. Dostert

PIERRE E. DOSTERT

September 15, 1966

William P. MacCracken, Esquire
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

Dear Mr. MacCracken:

As general counsel of the Sidwell Friends School, I have been advised regarding the unfortunate conflict which has arisen over the education of John Hinton, grandson of your client. Mr. Bellinger of our office has been consulted by John's father in the matter.

I am concerned that both parties understand the position of the school in this matter. As an educational institution, Friends School can take no position regarding the dispute between John's parents and his grandmother. We are confident that all parties have the best interest of the boy in mind.

However, we know that John is disturbed by the conflict and is considering dropping out of school altogether this year. This is unfortunate, because he has unusual scholastic abilities; at the present time he is one of the National Merit Scholarship Semi-Finalists. I am sure you are aware the school would be delighted to admit him as soon as his parents or guardian consent. At the present time, his father has directed us not to admit the boy.

I call your attention to the District of Columbia Code Title 16-2361 wherein a child is defined as a person under 18 years of age. Section 11-551 gives jurisdiction to the Juvenile Court over any child who is beyond the control of his parents or guardian or who is habitually truant from school. I mention this since the resolution of this unfortunate dispute may lie with the juvenile authorities.

We have no knowledge of the reasons why John refuses to return to his home and live with his father and mother. Furthermore, we do not consider it proper for us to inquire into those reasons. If you should decide to

place the matter in the hands of the juvenile authorities and obtain a court order investing custody in your client and she decides to send John to Friends, we will be happy to enroll him. Similarly, if we receive a communication from John's parent reversing their instructions that we should not admit him, we will also be delighted to admit him.

We are hopeful that this conflict can be resolved swiftly, preferably by mutual consent, so that John will not be handicapped in his education. Please feel free to call me if you wish to discuss the matter.

Sincerely yours,

Dickson R. Loos

DRL:ral
cc: Edgar T. Bellinger, Esquire

September 20, 1966

Mr. Robert Smith, Headmaster
Sidwell Friends School
4825 Wisconsin Avenue, N.W.
Washington, D.C.

Re: John Hinton

Dear Mr. Smith:

I have been notified that Mrs. Hinton has filed a custody petition in the District of Columbia. This may lead to a lengthy proceeding. I sincerely hope it does not. However, you may be requested by Mrs. Hinton to admit John to Sidwell Friends School during the pendency of the litigation. This poses a difficult problem.

As I pointed out to Mr. MacCracken, Mrs. Hinton's attorney, in my letter last week, the school cannot aid John in defiance of his parents' directions. We refused him in deference to instructions we received in writing from John's father. Now, however, the question of the right to control John's actions has been officially and formally raised. He is not at the moment attending school anywhere. There is considerable doubt that the public schools of the District of Columbia would admit him and, because of the custody suit just filed and because of John's residency in the District of Columbia, there may be some doubt whether he could be enrolled in Maryland. In any case, he has refused to return to his parents' home.

I think all parties agree that it is essential that John's education not be interrupted at this point. While I must insist that the school maintain an absolutely neutral attitude as to the merits of the controversy between John's parents and his grandmother, it seems to me that the duty to admit John so that he can continue his education clearly exists. As a private educational institution, it seems to me that Sidwell Friends has an obligation to the community to provide its facilities to a certain class of pupils. In this situation, where the only alternative seems to be that John would receive no education, we would not be discharging our obligations properly if we closed our doors to him. Since the

matter is before a Court in whose jurisdiction the school is, we can safely assume that should the Court determine that it is improper for John to attend Friends, a proper order would be directed to us with which we would, of course, comply.

Consequently, it is my judgment that Friends should admit John, provided that Mrs. Hinton requests that we do so. I would make a further stipulation that his admission is contingent upon a proper medical certificate certifying that John is in good physical condition and that attending Friends will not injure his health. I mention this since I recall that John's father raised some questions concerning his physical well-being.

I am sending copies of this letter to attorneys for both parties and I again would wish to emphasize that we will not and are not cooperating with anyone or opposing anyone in this matter and that our actions are dictated solely by what we consider to be our obligation as a private educational institution acting in the best interests of a boy who, under the law, is required to attend school.

Sincerely yours,

Dickson R. Loos

cc: Mr. William P. MacCracken
Mr. Edgar T. Bellinger
DRL:ral

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD C. HINTON VIRGINIA S. HINTON	:	
Plaintiffs	:	
vs.	:	Civil Action No. 1580-67
EVA ROBERTSON HINTON SIDWELL FRIENDS SCHOOL	:	
Defendants	:	

SUPPLEMENTAL POINTS AND AUTHORITIES

Corpus Juris Secundum, Parent and Child, §s 100-101, Voluma 67, pp. 851-857 states, inter alia, as follows:

> "A parent who has the right to the custody, control and services of a minor child may maintain an action for damages against anyone who unlawfully entices away or harbors such child"
>
> . . . . .
>
> (p. 854)
>
> "Damages (are) for loss of the child's services, the injury to the parent's feelings or his mental suffering caused by the wrong, the loss of affection and companionship of the child and reasonable and proper expenditures incurred in seeking to regain possession of the child.

Abdul-Rahman Omar Adra v. Clift, 195 F. Supp. 857 (Maryland U.S. District Court"

> "The unlawful taking or withholding of a minor child from the custody of a parent or parents entitled to such custody is a tort."

McEntee v. New York Foundling Hospital et al, 104 N.Y.S. 2d. 269
Copy attached to this Supplemental Memorandum, to be read as a part hereof.

Pierre E. Dostert

Pierre E. Dostert
Attorney for Plaintiffs
888 Seventeenth Street, N.W.
Washington, D.C. 20006 298-9233

CERTIFICATE

~~A copy of the foregoing Supplemental Points and Authorities was mailed to Dickson Loos,~~ Esquire, 888 Seventeenth Street, N.W., Washington, D.C. 20006, Attorney for Defendants, postage prepaid, this 29th day of April, 1969.

Helen H. McENTEE v. NEW YORK FOUNDLING HOSPITAL, James P. Keane and Frances Keane, his wife.

Supreme Court, Special Term, Kings County, Part I.
Dec. 7, 1959.

Action by mother against foundling hospital with which mother placed her 16-year-old daughter, and foster parents, with whom hospital placed daughter, for interference with mother's custodial rights. The Supreme Court, Special Term, Walter R. Hart, J., held that complaint was so garbled and vague that it would have to be deemed insufficient.

Action dismissed.

1. Parent and Child ⇐18

Action by parent for alienation of affection of infant child was not maintainable at common law, and, therefore, it was not one of the remedies "subjected to grave abuses, causing extreme annoyance [and] embarrassment" within Civil Practice Act Provision abolishing such remedies. Civil Practice Act, § 61-a et seq.

2. Parent and Child ⇐18

A third person may be liable to parent for abducting child by force, for enticing child away from parent, or for harboring child in sense of inducing or encouraging child to remain away from home, and it is not necessary, as a prerequisite to parent's recovery, to establish loss of child's services.

3. Parent and Child ⇐18

Consent of child is no defense to parent's action against third person for abducting child by force, for enticing child away from parent, or for harboring child in sense of inducing or encouraging it to remain away from home.

4. Parent and Child ⇐18

In action by parents against third persons for interference with custody of children, parents are entitled to recover for their injured feelings and to an award of punitive damages.

5. Parent and Child ⇐18

Where third person interferes with parent's custodial rights in regard to infant child, parent's remedy is not limited to habeas corpus.

6. Parent and Child ⇐18

In action by mother against foundling hospital, with which mother placed 16-year-old daughter, and foster parents, with whom hospital placed daughter, for interference with mother's custodial rights, com-

plaint was so garbled and vague that it would have to be deemed insufficient.

7. Action ⇐2

Not every violation of duty is actionable.

8. Conspiracy ⇐18

In action by mother against foundling hospital, with which mother had placed her 16-year-old daughter, and foster parents, with whom hospital placed daughter, for interference with mother's custodial rights, complaint, which alleged that acts of foster parents had been done with the connivance, consent, and active participation of hospital and with malicious purpose to accomplish a perversion of justice amounting to a conspiracy, was patently deficient as to hospital in view of failure to allege tortious acts on part of hospital.

9. Conspiracy ⇐1

Where alleged conspiracy results in commission of that which could be an actionable tort, it is the tort, not the conspiracy, which is actionable.

Joseph T. McEntee, Brooklyn, for plaintiff.

Mudge, Stern, Baldwin & Todd, New York City, for defendants.

WALTER R. HART, Justice.

The complaint herein, challenged for insufficiency, alleges that plaintiff is the mother of Ellen Patricia Huley, an infant sixteen years of age; that she had placed her daughter with the Welfare Department of the City of New York, which in turn placed her temporarily with defendant New York Foundling Hospital with the understanding that the infant would be returned to plaintiff when she was able to care for the infant in her home. It is further alleged that the Foundling Hospital placed the child with defendants Keane with the same understanding. The complaint then alleges that defendants Keane "discouraged and prevented the plaintiff from visiting her said infant daughter" and "restrained and prevented her daughter from seeing and visiting the plaintiff and counseled and induced the said infant to run away, abandon and desert the plaintiff, and prevented plaintiff's daughter from returning to and living with plaintiff in her home." It is further alleged that the acts of the defendants Keane:

> "* * * were done with the connivance, consent and active participation of the defendant New York Foundling Hospital and were committed and done with a wilful and malicious purpose to accomplish a perversion of justice amounting to a conspiracy between the defendants to keep the plaintiff and her infant daughter separate and apart and to prevent

the said infant from returning to and living with and in the plaintiff's home in the natural and accepted relation of mother and daughter and has caused the plaintiff great mental torture and suffering and grief and has deprived her of the association and company of her daughter * * *."

[1] It is to be observed in passing that not a single date with respect to any of these incidents is set forth in the complaint. However, no corrective motion to make more definite and certain has been addressed thereto. The instant motion is limited to the issue as to the sufficiency of the complaint. The question is raised by defendants' contention that the allegations set forth simply a cause of action for alienation of the affection of plaintiff's infant daughter, that such an action was not cognizable at common law and that if it were it is now barred by public policy as expressed in article 2–A of the Civil Practice Act. The purported dilemma created by the form of this contention is self-defeating. If, as is the fact, such an action were not maintainable at common law (Miles v. Cuthbert, Sup., 122 N.Y.S. 703; Restatement of the Law of Torts, § 699; Pyle v. Waechter, 202 Iowa 695, 210 N.W. 926, 49 A.L.R. 557), then it was not one of "the remedies subjected to grave abuses causing extreme annoyance and embarrassment" (Civ.Prac.Act, § 61–a).

[2–5] It is apparent, however, that the complaint purports to allege, though insufficiently, not simply alienation of affections of the child but also an interference with the custody, association and companionship of the infant. Such facts, if properly set forth, would be actionable. Cf. Pyle v. Waechter, supra. The controlling rule, buttressed by cited authorities, is succinctly set forth in Prosser, Law of Torts (pp. 692–693):

"While about half of the courts still appear to require a loss of 'services' as the foundation for the action, most of them are willing to find a 'constructive' loss whenever the plaintiff has the right to services, although none are being rendered, as in the case of the kidnapping of a child four months old. Once loss of services is established, the parent is allowed to recover damages for deprivation of the child's society, expenses to which he has been put in recovering it, and the wound to his own feelings. A few courts, recognizing that the real cause of action is the interference with the relation, have adopted the 'modern view' that loss of services is not essential where a child has been taken from its parent, and that such other damages are a sufficient basis for the action. The two courts which thus far have considered the question have held, however, that no action will lie for the mere alienation

> of the child's affection, in the absence of either seduction or removal from home.
>
> "With these qualifications, the defendant may be liable for abducting the child by force, for enticing it away from its parent, or for 'harboring' it in the sense of inducing or encouraging it to remain away from home. The consent of the child is of course no defense to the parent's action."

See also 40 Columbia Law Rev. 604.

Defendants' contention that plaintiff's sole remedy for interference with custodial rights is a writ of habeas corpus is without merit. As seen from the foregoing, a violation of those rights is actionable. The New York law, as expressed in Pickle v. Page, 252 N.Y. 474, 169 N.E. 650, 72 A.L.R. 842 dispenses with the necessity, in cases involving interference with custody, of establishing loss of services and holds that the parents are entitled to recover for injured feelings and to an award of punitive damages.

[6] The complaint herein, however, is so garbled and vague that it must be deemed insufficient. It alleges the voluntary placement of the child and alleges in paragraph 8 that defendants "induced the said infant to run away, abandon and desert the plaintiff, and prevented plaintiff's daughter from returning to and living with plaintiff in her home" and in paragraph 9 that defendants induced and prevented "said infant from returning to plaintiff's home." There appears to be a hiatus in the factual background as to whether the infant at any time did reside with plaintiff before she was induced "to run away, abandon and desert the plaintiff" and restrained her from returning to plaintiff. Defendants in their brief assert that plaintiff never did seek or acquire custody. This is controverted in plaintiff's reply memorandum. The facts with respect thereto may not be gleaned from the complaint. The court fails to comprehend how the infant could run away from plaintiff and be restrained from returning to her if she never resided with her.

[7] Plaintiff, in an effort to sustain the sufficiency of the complaint, alleges that defendants Keane violated the duty of foster parents to orient the child properly so as to prepare her for her eventual return to plaintiff. This contention is bottomed on the opinion of the court in Matter of Jewish Child Care Ass'n of New York (Sanders), 5 N.Y. 2d 222, 183 N.Y.S.2d 65. The language culled from that opinion in a habeas corpus proceeding is not apposite to sustain an action for damages predicated on a violation of the duty. Not every violation of duty is actionable. The opinion quoted from was applicable to the facts there present, namely, a proceeding by a social welfare organization to recover custody of an infant from foster parents who had become attached to the child left in their care and refused to surrender the child on demand. In appraising language of an opinion it must be borne in

mind that "opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts." Freeman v. Hewit, 329 U.S. 249, 252, 67 S.Ct. 274, 276, 91 L.Ed. 265, quoted in Danann Realty Corp. v. Harris, 5 N.Y.2d 317, 322, 184 N.Y.S.2d 599, 603.

[8, 9] The complaint with respect to defendant Foundling Hospital alleges that the acts of defendants Keane were done with the connivance, consent and active participation of the hospital and were committed and done with the wilful and malicious purpose to accomplish a perversion of justice amounting to a conspiracy. The complaint is patently deficient as to this defendant since it fails to allege any tortious acts on its part. Charging a conspiracy without alleging any act on this defendant's part is insufficient since the tort and not the conspiracy is actionable. Cf. Green v. Davies, 182 N.Y. 499, 75 N.E. 536; Kunz v. Silver, 198 Misc. 1032, 101 N.Y.S.2d 657; Heller v. Brown, Sup., 101 N.Y.S.2d 355.

Accordingly, the motion to dismiss is granted with $10 costs. Plaintiff, if so advised, may amend her complaint within ten days after service of a copy of the order with notice of entry. Settle order on notice.

MAMMOTH HOME IMPROVEMENT CORP. v. James F. SIMPSON and Lillian Simpson.

Supreme Court, Trial Term, Nassau County, Part VII.
Dec. 18, 1959.

Action for breach of contracts for erection of garage and for installation of fences and concrete walk. The Supreme Court, Trial Term, Nassau County, Fred J. Munder, J., held that evidence failed to establish that 30 per cent of the contract price as liquidated damages was a reasonable basis for determining plaintiff's loss of profits on the garage contract and that evidence established that defects in plaintiff's performance in installation of fences and concrete walk were not insubstantial.

Dismissed.

1. Damages ⇐80(1)

Liquidated damages constitute compensation which parties have agreed must be paid in satisfaction of loss or injury which will follow from breach of contract, and such damages must bear reasonable propor-

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

HAROLD C. HINTON, et al., :

Plaintiffs, :

v. : Civil Action No. 1580-67

EVA ROBERTSON HINTON, et al., :

Defendants. :

MEMORANDUM IN REPLY TO SUPPLEMENTAL POINTS AND AUTHORITIES

1. The complaint against defendants is for alienation of affections. None of the authorities cited in the Supplemental Memorandum indicate that any jurisdiction anywhere recognizes an action for alienation of affections where the alleged wrong is a disruption of a parent-child relationship. The section of Corpus Juris Secundum cited is an action for damages for unlawful enticement or harboring of a child. As pointed out in Corpus Juris (p. 855) in order to be sufficient, the complaint must allege all material facts necessary to constitute a cause of action for enticing away or harboring the child. It is thus apparent that alienation of affections and the tort of enticing or harboring are different causes of action. Since this complaint is for alienation of affections it must be dismissed.

2. Defendants object to any amendment of the complaint to allege a different cause of action. As pointed out in defendant's Motion for Summary Judgment, the minor child was turned over to defendant, Eva Hinton, voluntarily at a time when plaintiffs had such difficulties in controlling the minor child that they had enlisted the aid of the juvenile authorities of Montgomery County. It is thus apparent that there could have been no tort of enticement or harboring of the minor.

3. It is to be noted that the case of Abdul-Rahman v. Clift, 195 F. Supp. 857, involved a custody action. The other case, McEntee v. New York Foundling Hospital, 104 N.Y.S. 2d 269, appears to have been founded on alienation of affections. The New York Court held that an action of alienation of affections would not lie in a parent-child relationship. It then discussed whether or not the complaint stated a cause of action for unlawful enticement or harboring. It is of interest that the complaint was dismissed as insufficient. Among the reasons for dismissing the case is that the complaint alleged voluntary placement of the child and then alleged that defendants induced the child to run away and desert plaintiffs. As the Court pointed out, it is difficult to imagine how a child could run away from a parent if the child did not reside with the parent. The same situation obtains in this case which is undoubtedly the reason plaintiffs did not allege enticement or unlawful harboring in the first place.

4. The McEntee case also involved suit against the Hospital. The Court pointed out (p. 273) that the complaint is patently deficient as to the Hospital since it failed to allege any tortous act on its part. The same is true with respect to the defendant Sidwell Friends School. That defendant is charged with permitting the student to enroll for his final year at Sidwell Friends and permitting the child to receive a diploma when he completed his work. Neither of these amounts to a tort of any kind especially since the child was originally enrolled voluntarily at Sidwell Friends by the parents.

Accordingly, the complaint must be dismissed since it fails to state a cause of action against either defendant.

/s/ Dickson R. Loos

Dickson R. Loos
Pope Ballard & Loos
700 Brawner Building
888 17th Street, NW.
Washington, D. C. 20006
298-8600

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

HAROLD C. HINTON, et al.,	:	
Plaintiffs,	:	
v.	:	Civil Action No. 1580-67
EVA ROBERTSON HINTON, et al.,	:	
Defendants.	:	

ORDER

Upon consideration of the joint motion of defendants for summary judgment, and of the supporting and opposing memoranda filed herein; and upon further consideration of the contentions of counsel presented upon oral argument and in supplemental memoranda filed herein; and upon consideration of the record and of the depositions heretofore taken and filed herein, it is by the Court this _____ day of May, 1969,

ORDERED that the joint motion of defendants be, and the same hereby is, granted and the complaint be dismissed against both defendants with prejudice.

_____
Judge

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Order was mailed to Pierre Dostert, Esquire, 888 17th Street, NW., Washington, D. C. 20006, attorney for plaintiffs, this _____ day of May, 1969.

Dickson R. Loos

Dickson R. Loos

40

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD C. HINTON VIRGINIA S. HINTON	:	
Plaintiffs	:	
vs.	:	Civil Action No. 1580-67
EVA ROBERTSON HINTON SIDWELL FRIENDS SCHOOL	:	
Defendants	:	

MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

Plaintiffs, by and through their attorney, move this Court for leave to file an amended complaint herein, and state as follows:

1) This Court granted defendants' Motion for Summary Judgment filed herein, presumably on the ground that as a matter of law there is no action for Alienation of Affections based on the relationship of parent and child in the District of Columbia; this conclusion is reached in view of the many disputes of factual issues involved in the matters giving rise to the action of plaintiffs against defendants.

2) The plaintiffs wish to file an amended complaint herein for the tort of enticing and harboring of their minor child and for conspiracy to commit the tort of enticing and harboring their minor son, all of which was against the will of plaintiffs, the legal custodians of their minor son.

3) Leave of Court is required under the Federal Rules of Civil Procedure to file an amended complaint after the complaint has been answered.

WHEREFORE, Plaintiffs pray this Court for leave to file an amended complaint.

Pierre E. Dostert

Pierre E. Dostert
BORZILLERI & DOSTERT
888 Seventeenth Street, N.W.
Washington, D.C. 20006 298-9233

POINTS AND AUTHORITIES

Rule 15 (a), Federal Rules of Civil Procedure

Cases and materials contained in Supplemental Points and Authorities filed herein on behalf of Plaintiffs.

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed to Dickson Loos, Esquire, 888 Seventeenth Street, N.W., Washington, D.C. 20006 and to William P. MacCracken, Jr., 1000 Connecticut Avenue, N.W., Washington, D.C. 20006, Attorneys for Defendants, postage prepaid, this 12th day of May, 1969.

Pierre E. Dostert

Pierre E. Dostert

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

HAROLD C. HINTON, et al., :

Plaintiffs, :

v. : Civil Action No. 1580-67

EVA ROBERTSON HINTON, et al., :

Defendants. :

OPPOSITION TO MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

1. After hearing argument on April 25 and permitting plaintiffs to file additional memoranda of points and authorities, the Court granted defendants' motion for summary judgment as of May 1, 1969. A card announcing the Court's decision was mailed on May 5. Plaintiffs' motion filed on May 12 has no standing since the action has been dismissed.

2. The complaint in this case was filed over a year and a half ago. At no time during this period has any attempt been made to amend the complaint. The motion for summary judgment clearly indicated the complaint failed to state a cause of action. Plaintiffs never made any attempt to amend the complaint and the amendment of the complaint comes too late.

3. It is equally obvious that such amendment would be pointless since the undisputed facts clearly show that neither of defendants could be guilty of enticing and harboring the minor. Plaintiffs took the minor to defendant, Eva Hinton, voluntarily. Similarly the child was enrolled at the Sidwell Friends School voluntarily by plaintiffs.

WHEREFORE, the premises considered, defendants pray that the motion for leave to file amended complaint be denied.

Dickson R. Loos

Dickson R. Loos

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888 17th Street, NW.
Washington, D. C. 20006

Attorney for defendant Sidwell Friends School

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition to Motion for Leave to File Amended Complaint was mailed to Pierre Dostert, Esq., 888 17th Street, NW., Washington, D. C. 20006, and to William P. MacCracken, Esq., 1000 Connecticut Avenue, NW., Washington, D. C. 20036, this 13th day of May, 1969.

Dickson R. Loos

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD C. HINTON, et al.,	)	
Plaintiffs	)	
vs.	)	Civil Action No. 1580-67
EVA ROBERTSON HINTON, et al.,	)	
Defendants	)	

MOTION FOR RELIEF UNDER RULE 60 (b) (6)

Plaintiffs, by and through their attorney, move this Court to vacate a judgment of dismissal herein entered on the docket of this Court on May 14, 1969, and states as follows:

1. The judgment of dismissal herein was the result of a Motion for Summary Judgment on the ground that an action for alienation of affection does not lie with respect to the parent-child relationship.

2. Plaintiffs have heretofore filed a motion for leave to file an amended complaint stating a cause of action against defendants for enticing and harboring their minor child, which motion is now pending.

3. In order to file an amended complaint after a dismissal, the judgment of dismissal has to be vacated under Rule 60 (b), Federal Rules of Civil Procedure Szalkiewicz vs. Farrell Lines, Inc. 142 F.Supp. 496.

WHEREFORE, Plaintiffs pray that the judgment of dismissal entered herein on May 14, 1969 be set aside under Rule 60 (b)(6), F.R.C.P., and for such other and further relief the Court may deem just.

PIERRE E. DOSTERT
Borziffori & Dostert
888 Seventeenth Street, N.W.
Washington, D.C. 200006
298-9233

45

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Relief under Rule 60 (b)(6) was mailed, postage prepaid to the following attorneys for defendants, Dickson Loos, 888 17th Street, N.W., Washingt n, D.C. 20006, and William P. MacCracken, Jr., 1000 Connecticut Avenue, N.W., Washington, D.C. 20036, on this 14th day of May, 1969.

/s/

PIERRE E. DOSTERT

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

HAROLD C. HINTON, ET AL., :

Plaintiffs, :

: Civil Action No. 1580-67

v. :

EVA ROBERTSON HINTON, ET AL., :

Defendants. :

OPPOSITION TO MOTION FOR RELIEF UNDER RULE 60(b)(6)

1. Rule 60(b) provides for extraordinary relief from a final judgment and may only be invoked upon a showing of exceptional circumstances. John E. Smith's Sons Co. v. Lattimer Foundry and Mach. Co., 239 F.2d 815, 817 (C.C.A. 3, 1956).

2. Plaintiffs' motion fails to refer to any exceptional circumstances. There was ample opportunity during a period of over one year to file an amended complaint but they failed to do so. The fact that plaintiffs elected to rely on the original complaint rather than offer an amended complaint is not exceptional circumstances within the contemplation of Rule 60(b)(6).

3. It is obvious from the pleadings, the depositions and the authorities cited in the motion for summary judgment filed by defendants that no cause of action exists against either of these defendants on any basis and no purpose is served by continuing the litigation.

Dickson R. Loos

Dickson R. Loos

Pope Ballard & Loos
700 Brawner Building
888 17th Street, NW.
Washington, D. C. 20006
298-8600

Attorney for defendant Sidwell Friends School

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Points in Opposition to Motion for Relief was mailed, postage prepaid, to William P. MacCracken, Jr., Esq., 1000 Connecticut Avenue, NW., Washington, D. C. 20036, attorney for defendant Eva R. Hinton, and to Pierre E. Dostert, Esq., 888 17th Street, NW. Washington, D. C. 20006, this 22nd day of May, 1969.

Dickson R. Loos

Dickson R. Loos

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

FILED

JUN - 9 1969

ROBERT M. STEARNS, Clerk

HAROLD C. HINTON, et al.,

Plaintiff

vs.

EVA ROBERTSON HINTON, et al.,

Defendant

No. 1580-67

ORDER

Upon consideration of the motion of plaintiffs for relief under Rule 60 (b) (6) filed herein, May 22, 1969 it is this 9th day of June, 1969,

ORDERED that the said motion be and the same hereby is denied.

ROBERT M. STEARNS, Clerk

By _____
Deputy Clerk

AUBREY E. ROBINSON, JR.
PRESIDING JUDGE

(N)

APPEARANCES:

On behalf of the Plaintiffs:

Pierre Dostert, Esq.,
888 Seventeenth Street, N.W.,
Washington, D. C.

On behalf of the Defendants:

William P. MacCracken, Jr.
1000 Connecticut Avenue, N.W.,
Washington, D. C.,
and
Dickson R. Loos,
888 Seventeenth Street, N.W.,
Washington, D. C.

- - -

MR. DOSTERT: Our stipulation is, then, that this deposition is taken for District Court action only and not for General Sessions.

MR. MacCRACKEN: Yes, sir. You got notices for both, but it will only be for the District Court.

MR. DOSTERT: And will only have that caption on it, and be filed in the District Court.

MR. MacCRACKEN: Fine.

Thereupon,

FRANK MILLS,

a witness of lawful age, was duly sworn by the notary public, and, being examined by counsel, testified as follows:

BY MR. LOOS:

Q Mr. Mills, would you please state your full name, please?

A Frank Leon Mills, Jr.

Q And where are you employed at the present time?

A The Maryland Children's Center.

Q What is the nature of your duties at the children's center?

A Assistant Superintendent.

Q How long have you been working there?

A Since May 1 of this year.

Q What is your business address?

A I think 5700 West Lanham Boulevard, Baltimore.

Q Prior to your employment by the children's center, where were you employed?

A The Montgomery County Juvenile Court.

Q What was the nature of your duties there?

A I supervised a unit of probation officers.

Q And how long had you been working in that capacity?

A Approximately two and a half years.

Q Did you know a minor by the name of John Hinton?

A Yes.

Q Did you bring with you a record pertaining to John Hinton?

A Yes.

Q And is this the official record kept by the Montgomery County Juvenile Court?

A Yes.

Q Now, do you know John Hinton's parents?

A Yes.

Q When did you first meet John Hinton?

A May 4, 1966.

Q Do your records indicate whether that was the first time the juvenile court had any contact with John Hinton or not?

A That was not the first contact.

Q When was the first contact that the records indicate?

A 8/28/64.

Q And by 8/28, does that mean August 28, 1964?

A Yes.

Q What were the circumstances which surrounded the contact between the juvenile court and John Hinton?

A John had run away from home three times in the last four days, prior to 8/28/64, and the juvenile aid bureau, therefore referred the case to the Montgomery County Juvenile Court.

Q Now, did you or any person in your office take occasion to investigate the conditions existing in John's home at or about the time that he ran away?

A Yes.

Q Now, what type of reports are contained in your file here?

MR. DOSTERT: I am going to object to this line of questioning at this time. I don't think there has been any proper foundation made as to whether this witness was at that

time a supervisor or had contact with this case.

BY MR. LOOS:

Q Would you please answer the question? What type of reports does your file contain?

A There is a stenographer's report on the detention conference that was held on 8/28/64. There are several police reports from the juvenile aid bureau. There is a running record by the first probation officer. There is a medical report from the Hinton's family doctor. There is a psychiatric evaluation from a private psychiatrist. There is a social history, and there are running records by the second P.O., and by myself.

Q Now, you mentioned a psychiatric report. Is that report considered to be, by the court, confidential?

A Yes, sir, it is.

Q And you would not be in a position at this time, I take it, to divulge its contents on the record?

A I think I could.

Q You think you could?

MR. DOSTERT: I am going to object and request that the report itself be placed into the record of this deposition, and it can speak for itself.

MR. LOOS: Very well.

Mr. Dostert, I was going to suggest that if you had an objection to the report on the grounds that it is confidential, that I would not pursue it at this time, in view of

MR. LOOS: How about you, Mr. MacCracken?

MR. MacCRACKEN: I will agree.

MR. LOOS: Very well.

BY MR. LOOS:

Q Did I understand that you have also made an evaluation of John's case in the course of your testimony of what your file contains?

A I am sorry. I don't understand.

Q I thought you said there were evaluations made and reports filed, including a report, or a running record made by yourself?

A Yes.

Q Now, you have met John, have you not?

A Yes.

Q Did you have any knowledge that John was living with his grandmother?

A Yes.

Q Do you know whether or not John went to his grandmother with the consent of his parents?

A I think the record indicates that initially he did have the consent.

Q Of his parents?

A Yes.

Q Now, did there come a time when the parents came to you and solicited your aid to have John returned to their home?

A Yes, and no.

Q Would you explain that answer, please?

A I think initially I had the feeling that they wanted John returned. However --

MR. DOSTERT: I am going to object to the answer as being responsive. The feelings of the witness are not probative evidence. I think we should stick to the facts.

BY MR. LOOS:

Q Would you just state whether or not they did solicit your aid in having him returned, and then explain your answer in the best way you can?

A I would think that the appropriate answer would be No.

Q They did not?

A On May 18, I saw John's parents. At the close of that contact they stated that he could remain with the grandmother. However, they wanted him seen by a doctor, and I think they were referring to a Dr. Brooks, the family physician.

Q Now, did you ever meet Mrs. Eva Hinton?

A Yes.

Q Do you know who she was?

A Yes.

Q Who was she?

A The paternal grandmother.

Q Did you ever talk with her?

A Yes.

Q Were you able to form any opinion as to John's condition, or his environment, while he was living with his grandmother?

A Yes.

Q What was your opinion?

MR. DOSTERT: Objection again. It is a request for an opinion instead of fact.

MR. LOOS: You may answer.

THE WITNESS: I felt that his overall adjustment was quite satisfactory.

BY MR. LOOS:

Q Does there exist anywhere in the record any recommendation, either by you or by someone else, as to whether John should remain with the grandmother or return home with his parents?

A Yes.

Q And what was that recommendation?

A The recommendation was that he be allowed to remain with the paternal grandmother.

Q And did you concur in that recommendation or not?

A I did.

Q Now, did, in the course of your conversations with the parents, or with John, or with Mrs. Eva Hinton, did you ever go into the enrollment of John Hinton at the Sidwell Friends School?

A Yes.

Q Do you know whether or not the parents objected to John going to the Sidwell Friends School?

A Yes, I do.

Q Did they object?

A No.

Q Did you have any discussion with the parents with regard to John's attending school at all?

A Would you repeat the question?

Q Did you have any discussion with John's parents about John attending Sidwell Friends School?

A Yes.

Q What was their attitude toward John attending school?

A The mother stated in the presence of the father that if she, referring to the paternal grandmother, wants to pay for this, since we cannot afford it, for the next year, then it is okay with us.

Q Very well.

Did you yourself make any investigation as to whether the Sidwell Friends School was a proper educational institution for John?

A No.

MR. LOOS: Well, I don't think I have any further questions. Do you have any additional questions to direct?

MR. MacCRACKEN: There is just one thing that occurred in my mind, and I thought I wouldn't interrupt your line of

BY MR. DOSTERT:

Q Yes.

A Yes.

Q And the officers who worked under you had possibly one more contact, is that correct?

A No.

Q Was the boy re-examined in 1966 when this recommendation to remove him from his parents' home was made?

A What do you mean, re-examined?

Q By the psychiatrist.

A Not to my knowledge.

Q John didn't want to live at home, did he?

A No.

Q Did he tell you the reasons why he didn't want to live at home?

A Yes.

Q What did he say?

A I think he was saying that his mother was sick, and that his father would not have her committed to a mental institution. I think that is part of it. I think he was saying that he hated his mother, and that his feelings about his father were very similar to hate, although there was some indication of some ambivalence. But I guess the strongest word I could say was that he disliked his father, or could not stand his father. But it was a bit different from hate, which was

associated with the mother, mother-son relationship.

Q Did you make any inquiry as to whether those feelings were justified?

A Could you be a bit more specific, please?

Q Did you make any inquiry as to whether those emotional reactions of the boy were justified or unjustified?

A Yes.

Q What investigation?

A Further discussion with the child, and review of the materials that we had on the case.

Q And what facts justified his opinion, or his expression, or emotion?

A The emotional instability of the mother. her seemingly wearing the pants in the family.

Q Is that reflected anywhere in the file there?

A Yes.

Q In what part?

A In the running record.

Q Who made the entry of that?

A I did.

Q When?

A What were the two statements?

Q The one, mother wore the pants in the family; where is that?

A My 5/18/66 entry.

Q Your conclusion was that the child belonged with his paternal grandmother?

A As opposed -- well, as opposed to the home of the natural parents, the parents, yes.

Q Was there any decision of the court to that effect?

A No.

Q Will you explain to me the reason why this matter was not taken before Judge Noyes in Montgomery County, if these things are true?

A Basically because the case was being handled informally, and because the child no longer resided within our jurisdiction.

Q Don't you usually -- isn't it the practice of the court to close files when the child leaves the jurisdiction?

A I would say in most instances, yes.

Q But in this it was not?

A No.

Q Would you explain why?

A And there have been other instances.

Q Would you explain why?

A There was the possibility that he would return to our jurisdiction. In similar instances, we would hear the case, place the child on probation, and refer it to the appropriate court. In this instance it would have been the D. C. Juvenile Court.

Q No such referral was made?

A No.

A I thought she -- I didn't see her, but I thought she hung up, and I called her right back, and I asked her if we had been cut off, although I felt comfortable with my impression that she had hung up. And she said that we had been cut off. And it wasn't long before she became upset again and hung up again.

Q What were you telling her in that conversation?

A I was trying to arrange a conference between myself, the mother, the father, and the paternal grandmother. First she said no. Then she said yes, only if the grandmother would release the promised money and allow her name to go on some note. And -- well, that was primarily what took place.

Q Now, was a conference ever arranged?

A No.

Q Has any determination been made, either by a social worker of the Montgomery County Court or of the court itself with respect to the custody of John Hinton since September 1966?

A Would you repeat that, please?

Q Has any determination been made by either a social worker or the juvenile court of Montgomery County since September 1966?

A Are you referring to a court order?

Q Any recommendation, order, anything of that nature?

A To whom?

Q To anybody.

A I think no.

Q Are you stating that as a fact, now?

A If you are referring to an official order, it is no.

Q Recommendation?

A A written recommendation?

Q Yes.

A No.

Q An oral recommendation?

A To whom?

Q To anybody.

A Yes.

Q To whom was it made?

A Probably to the grandmother, and it probably involved my telling her that I felt that in the best interest of this child it was best that he remain in her home, as opposed to the home of the natural parents.

Q When did you make the recommendation?

A I could not tell you. It probably occurred fairly constantly during our telephone contacts. It was implied. I doubt that I -- well, it was not a recommendation; just expressing my feelings, and my --

Q As an individual?

A Not really.

Q As an official of the Montgomery County Courts?

A Not really.

As a social worker who was concerned about this child's wellbeing.

Q Then you evidently feel that any social worker concerned with any child is free to make recommendations with respect to his custody?

A No. And as far as making a specific recommendation, I think my feelings sort of imply -- well, maybe more than implied. As I said before, my feeling was that this placement, the latter placement with the paternal grandmother was by far the best, as opposed to that of the natural parents. I don't have to say that I recommend so and so and so, but it is implied, you know.

Q How many children do you have?

A I have two.

Q And if a social worker became interested in them and recommended that they be taken from you, would you feel satisfied with his recommendation or opinion?

A It would depend on the conditions in my home. It would depend on his facts, his contact with, his knowledge of my total situation.

Q If he did it on the basis of telephone calls, would you accept that?

A No. Solely on telephone calls?

Q Yes.

A No.

A It depends on the circumstances.

Q Should it be the position of the social worker to aid him?

A It depends on the circumstances.

Q Should a court, before aiding him, look into the justification for his rebellion?

A Would you repeat that?

Q Should a court, before aiding him, look into the justification for his rebellion?

A I don't understand your question.

Q Prior to aiding a rebellious boy, would it be incumbent upon a court or a social worker to investigate the reason for his rebellion?

A Certainly.

Q If parents have control of their children, is it wise to remove them from their homes?

A It depends on what you mean by control. I can think of many instances where parents maintain control but are not fit parents, and a child would be far better off removed from that home. Control is just one aspect of many very important elements.

Q Now, do you consider, in this case, that John Hinton was in a state of rebellion against his parents?

A Partially.

Q Could Eva Hinton have compelled John to contact his

parents during the period of time which he did not?

A Compelled? I would think not. I think, as I stated previously, that she was trying to persuade him to contact the father.

Q She really couldn't compell him to do anything, could she?

A Yes, and no.

Q Explain your answer.

A I would think that there were some things that she could compell him to do, and he would comply with this.

Q Name them.

A Don't cut any classes.

Q He would comply with her?

A I would think -- this is my impression.

Be home by 11:00.

Q But not to contact his parents?

A I would think that the best she could do would be to urge him, to show him the advantages of doing this, and then leave it in his hands. He certainly does not have to do this, and he had reason not to.

Q You assume that he had reason not to?

A Yes, I do.

Q How would she compell him not to cut classes or to come in after 11:00?

A Probably simply by saying, John, don't do this.

Q Well, what coercion would she have if he said, Foo on you; or, I won't do it?

A She would probably contact me.

Q And?

A And then I would contact John.

Q And what coercion would you use to make him change his mind?

A The best I could do would be to help him see the advantages and disadvantages of whatever action this is.

Q Do you consider it would have been a wise thing, during the passage of all this time if Eva Hinton had said to John Hinton, Look, you can stay here, but mend your fences with your parents? If you don't, you can't stay here?

A I think in a way she was saying that, and I think in a way, much of that was impossible. I would think some of those fences were beyond repair.

Q So there should be no attempt made --

A I am not saying that.

Q Should there have been?

A In fact, I encouraged an attempt, and I think the grandmother did, too.

Q You encouraged n attempt?

A This was with respect to the father and son.

Q And how did you encourage it?

MR. LOOS: I am going to note on the record that you

have already asked that question. He has already answered it. I don't think there is any necessity to go into it any further. I recognize there is plenty of scope for cross examination, but I also object to having the record unnecessarily enlarged.

MR. DOSTERT: Answer the question.

THE WITNESS: How did I encourage John?

MR. DOSTERT: Yes.

THE WITNESS: Through my contact with him, and also through my contact with his grandmother.

BY MR. DOSTERT:

Q Did you ever tell John to contact his parents?

A Parents, no; father, yes.

Q How many times?

A I don't know. I think I can safely say not many, to John.

Q You mentioned the name of Dr. Clifton Brooks earlier in this deposition. Does his name appear in the record that you have?

A Yes.

Q In what respect?

A He had seen the boy. He had been a part of the child's commitment to Washington Sanitarium for two and a half weeks, and the first probation officer had contact with Dr. Brooks and stated that he did not feel that the family was properly motivated to receive psychiatric help.

Q The social worker stated that?

A No.

Q Dr. Brooks did?

A According to the first probation officer, yes.

Q Was the judgment of Dr. Brooks in having the boy in Washington Sanitarium a correct one?

A I don't know.

Q Why don't you know?

A I am not a physician, and I am certainly not aware of the medical problems that John had, or supposedly had.

Q Do the records reflect that?

A Pardon?

Q Does the record reflect that?

A Reflect what?

Q Anything as to the judgment of Dr. Brooks?

A The judgment of Dr. Brooks?

Q That the boy needed psychiatric care?

A I don't know what you are asking now.

Q Dr. Brooks, according to what you have said, put the boy in Washington Sanitarium, is that right?

A Yes.

Q For psychiatric treatment?

A No.

Q For what?

A [redacted]

Q For what?

A Medical.

Q Of what nature?

A It was tied in with this whole bit of allergies.

Q "Bit of allergies"? Explain what you mean by that.

A I think that he is of the school of thought that allergies are very much involved, or solely involved in physical and psychological difficulties, and I think that the treatment that John received at Washington San was solely medical and was geared toward physical fatigue.

Q Where is that reflected in the record?

A In a letter to the first probation officer, dated October 29, 1964, Dr. Brooks stated that: "I recommended that we hospitalize him primarily for treatment of his chronic fatigue state and his nutritional aberration, and at the same time investigate his physical aberrations, which might be spontaneous or mainfestations of his primary problem of fatigue. He was admitted to the Washington Sanitarium and remained under treatment and study approximately two and one-half weeks."

Q Was that recommendation of Dr. Brooks accepted by the juvenile court?

A He is telling the juvenile court, he is telling Mr. Ryan that I, Dr. Brooks, recommended the hospitalization, and he did, in fact -- the child, in fact, experienced two and a half weeks of hospitalization.

Q Is there any other report of Dr. Brooks in that file?

A There is only one report, but reference is made to a contact that Mr. Ryan had with Dr. Brooks.

Q On what date?

A This reads like a summary of contacts, but the running record entry is dated 2/5/65. "I have also contacted Dr. Brooks, the family physician, who conveyed that the family is not motivated for treatment. He continues to see John and administer medication for his physical fatigue."

Q At a later date, didn't Harold and Virginia Hinton request that their child continue under the treatment of Dr. Brooks?

A Yes.

Q Did he continue?

A Not to my knowledge.

Q Is there a reason for it being discontinued?

A Probably because the boy did not want to see Dr. Brooks. I think he was willing to see any physician except one whom believed, well, attributed most pathology to allergies.

Q Dr. Brooks is wrong in this case?

A I did not say that. He may be 100 percent correct. I do not know. The boy felt he was wrong.

Q Was this a reasonable judgment on his part?

A Personally, I think it was not. However, it may well be, or it may well have been.

Q Do you feel that it was correct for a juvenile to decide upon his own medical treatment, based upon his own opinion of a doctor?

A Would you repeat that, please?

Q Do you feel it is proper for a juvenile to decide which doctor he will or will not see, based upon his own opinion of the abilities of that doctor?

A It would depend on the age of the juvenile.

Q Was it proper in this case?

A I don't know.

Q What efforts were made by Eva Hinton to insure the boy's religious instruction?

A I don't know.

Q Did you investigate?

A I did not.

Q What efforts were made by Eva Hinton with respect to the boy's moral upbringing?

A Without residing in the home, I certainly couldn't respond to that. However, as implied in my telephone contacts with her, I think that she did make effort.

Q What efforts did she take to insure the boy's education?

A One was to prevent his being taken out of Friends and placed in Roosevelt High School.

Q In which high school?

A Roosevelt.

Q In which jurisdiction?

A I think Roosevelt is in the District.

Q What area of the District?

A Up in northwest, to the best of my knowledge.

Q Who wanted to put him there?

A The parents did, as I saw.

Q Where is that reflected in the record?

A My 5/18/66 entry.

Q What does that state?

A As the paternal grandmother has refused to release funds reportedly promised to the parents, they, the parents, are seemingly "saying" -- and saying is in quotes -- unless you give us the money you promised, it is Roosevelt High School and George Washington University for John, instead of Sidwell Friends and Harvard or Yale, as your punishment.

Q As whose punishment?

A The grandmother's. This is what --

Q Who said that to you?

A This is in essence what I gathered. This is my impression of what they threw up to me in that 5/18/66 contact.

Q What facts led you to that impression?

A It has been two -- well, probably the best way to answer that would be to read this brief entry.

Q Is there an entry that says Roosevelt High School,

besides that seemingly said one that you read?

A No.

Q Did they represent, as a matter of fact, that they were going to send him there?

A Yes. This didn't come out of my head.

Q Are you aware of whether or not they could or could not have done that?

A No. I just went on what they were saying they would do if thus and so did not happen.

Q Is there anything wrong with Roosevelt High School?

A I don't know a thing about Roosevelt High School.

Q So it could be, for all intents and purposes, as good a school as Sidwell Friends?

A I would think not.

Q You would think not? Explain your reasons for that.

A It is based upon the many positives that I have heard about Sidwell Friends; and based upon my own personal knowledge of public schools in the District, I would think that there is quite a difference. I do not know, however.

Q Isn't it a fact in this case, Mr. Mills, that the net result of John's living with his grandmother is that John had custody of himself?

A I would think not.

Q I am asking whether this is true or not.

A What are you asking me?

Q Is it not a fact that the result of John living with his grandmother was that John had custody of himself?

A I would say no.

Q Give me the reason for that statement.

A Primarily his respect for his grandmother, his own fairly adequate judgment, and his not being clear on my role in this. I also served as a supporting safeguard, for lack of better term. Just from knowledge of my contact or my role with the court, I would think it would tend to keep him in line. And in addition, his knowledge of my frequent telephone contacts with his grandmother, although they were primarily related to keeping me informed about his progress or lack of same.

Q These telephone contacts ended the summer of 1966, didn't they?

A No.

Q When did they end?

A I don't think they have really ended. There was a gap which I cannot identify, but there has been some contact throughout.

Q Have you discussed this case with Eva Hinton recently?

A Discussed this case?

Q Yes.

A No. My last contact with her dealt with his progress at M.I.T. In fact, it was quite brief, because I didn't want to in any way interfere with the business at hand.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAROLD C. HINTON
VIRGINIA S. HINTON

Appellants

vs.

EVA ROBERTSON HINTON
SIDWELL FRIENDS SCHOOL

Appellees

No. 23,294

On Appeal From The United States District Court
For The District of Columbia, Civil Division

BRIEF OF APPELLANTS

Pierre E. Dostert
Attorney for Appellants
888 Seventeenth Street, N.W.
Washington, D.C. 20006

INDEX

TABLE OF CASES

* Cases chiefly relied upon by appellants

STATEMENT OF ISSUES PRESENTED

1. Whether in the District of Columbia an action lies for alienation of affections of a minor child from the natural parents of the child.
2. Whether in the District of Columbia an action lies for enticing and harboring a minor child from his natural parents against the wishes of his natural parents.
3. Whether after filing an answer to a complaint in which material issues of fact are disputed a party may seek and obtain summary judgment on the ground that there are no undisputed material facts.
4. Whether summary judgment is proper when there are genuine issues of fact that have not been determined.
5. Whether after granting summary judgment on the ground that a complaint fails to state a cause of action it is an abuse of discretion to refuse the party against whom such judgment is rendered leave to file an amended complaint.

* * * * *

STATEMENT UNDER LOCAL RULE 8 (d)

The pending case has not previously been before this Court under the same or a similar title.

REFERENCES AND RULINGS

None

STATEMENT OF THE CASE

Plaintiffs Harold and Virginia Hinton are the parents of a minor child, John R. Hinton. They filed an action against Defendant Eva Robertson Hinton (paternal grandparent of John R. Hinton) and against the Sidwell Friends School alleging that the defendants, individually and in conspiracy, had alienated the affections of John R. Hinton. This complaint (App. 2) was filed on June 21, 1967.

Defendants Eva Robertson Hinton and Sidwell Friends School filed answers to the complaint individually (App. 8, 12) denying the material facts alleged in the complaint and denying that plaintiffs were entitled to relief under the facts stated in the complaint.

Almost two years later the defendants filed a joint motion for summary judgment in their favor (App. 15). This motion asserted that there were no disputed material facts to be resolved by trial of the case, and further, that plaintiffs were not entitled to relief as a matter of law for alienation of the affections of their son by the defendants.

Plaintiffs responded in opposition to the motion for summary judgment, filing in support thereof a statement of genuine issues directly controverting the facts which defendants stated were undisputed (App. 22). The motion for summary judgment was heard by the United States District Court for the District of Columbia, Aubrey E. Robinson, Jr., U.S. District Judge presiding.

At the hearing on the joint motion for summary judgment, two exhibits were submitted to the Court for consideration (App. 28,30). The trial court announced at the conclusion of the hearing that it would take the joint motion for summary judgment under advisement and directed the parties to submit any additional points and authorities they wished. The plaintiffs submitted supplemental points and authorities (App. 32) to which the defendants filed a reply (App. 38).

The trial court granted the motion for summary judgment on May 5, 1969 (App. 40), dismissing the complaint with prejudice in that order. Plaintiffs filed a motion for leave to file an amended complaint on May 12, 1969 (App. 41) which was opposed by defendants on the ground that the complaint had been dismissed with prejudice (App. 43)

Plaintiffs then filed a motion under Rule 60 (b) (6), Federal Rules of Civil Procedure for relief from a judgment or order of the court, seeking to set aside the dismissal with prejudice in order to file an amended complaint (App. 45) Defendants opposed this motion on the ground that there were no exceptional circumstances which would warrant granting the relief sought (App. 47)

The trial court denied plaintiffs motion for relief under Rule 60 (b) (6) on June 9, 1969. Timely notice of appeal from the orders granting summary judgment in favor of the defendants and denying relief under Rule 60 (b) (6) was filed by plaintiffs and the record of the trial court was lodged in this Court within the proper time.

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STATEMENT OF FACTS

Inasmuch as there has been no trial in this case, nor has there been any finding of fact by the trial court or otherwise, there are no facts which have been proven or established for consideration by this Court in this appeal.

* * * * * *

SUMMARY OF ARGUMENT

1. Courts in this jurisdiction and others have recognized the right of parents to raise their children without external interference except for the most grave and serious of reasons; interference with this right by third persons amounting to an alienation of affections is actionable.

2. In some jurisdictions there lies an action for enticing and harboring a minor child from his parents. This is no more than a legal expression of a right to redress of the parents against third persons for alienating the affections of their child.

3. If a complaint raises substantial facts upon which recovery may lie and a defendant files an answer denying such facts, summary judgment against the complainant, in favor of the defendant, is improper unless the original complaint has been clearly shown to be false and perjurious.

4. Summary judgment cannot be entered when there are undetermined genuine issues of fact that would affect the outcome of a case.

5. Entry of a judgment of dismissal with prejudice on the ground that a complaint fails to state a cause of action when under the facts alleged in a complaint, a plaintiff could prevail if fully proven is improper; to do so without leave to amend when requested is an abuse of discretion of a trial court.

ARGUMENT

I. ALIENATION OF AFFECTION OF A MINOR CHILD FROM THE NATURAL PARENTS OF THE CHILD IS ACTIONABLE IN THE DISTRICT OF COLUMBIA.

Courts in this jurisdiction and others have from time to time been confronted with cases in which a non-parent seeks to remove custody of a child from the natural parent or natural parents of the child. Uniformly it has been held that such action is warranted under only the most extraordinary of conditions. As expressed by this Court in the case of Beall vs. Bibb, 19 App. D.C. 311 (1902)

> "No court can, for any but the gravest reasons, transfer a child from its natural parent to any other person . . . since the right of a parent under natural law, to establish a home and bring up children is a fundamental one and beyond the reach of any court." (citations omitted)

If, according to the law expressed by this court, a parent, or as in this case, parents, have the right under natural law to establish a home and bring up children, can it be said that a trespass upon that right is without redress? To hold otherwise would amount to holding that third persons possess a right superior to the power of the courts charged with administering the right given parents under this natural law.

In the case at bar, appellees urge that alienation of affections lies only for a trespass upon the relationship of husband and wife. This court has clearly indicated otherwise in the case of Eclov vs. Birdsong, 83 U.S. App. D.C. 104, 166 F.2d. 960 (1948) in which it was held that a claim for alienation of affections is not limited to the marital relationship between husband and wife on the theory of

loss of consortium. Loss of consortium is but one of the elements included in the tort of alienation of affections.

No authority need be cited for the proposition that parents have a right to recover for the loss of services of a minor child injured by the negligence of a third party. It cannot be said that parents have any less right against a third party who deprives them of the services of their child by alienating the affections of the child.

Perhaps the clearest statement of the law on this subject is found in the case of McEntee v. New York Foundling Hospital, et al, 194 N.Y.S. 2d. 269 (1959) which is reproduced in full at pp. 33-37 of the appendix filed in this appeal. Parents injured by third persons who interfere with their natural custody of children are not limited to habeas corpus to regain custody, but have the right to seek damages, compensatory and punitive, against such third persons. Consent of the child is no defense to an action of the parents against a third person for enticing the child from the parents or for harboring the child in the sense of inducing or encouraging it to remain away from home.

Ample remedies are provided for by law in this jurisdiction and others whereby a child may be lawfully removed from the custody of his parents by a third person who can show legal grounds for such removal. The law has been and is still that a person who interferes with the custody of a child of natural parents without legal justification is answerable in damages to the parents. To hold otherwise would permit the creation of a legal vacuum unnecessarily undermining family cohesion and stability.

II. ONE WHO ENTICES AND HARBORS A CHILD AWAY FROM ITS PARENTS IS LIABLE TO THE PARENTS OF THE CHILD IN THE DISTRICT OF COLUMBIA

The case of McEntee v. New York Foundling Hospital, et al, supra is nominally founded upon "enticing and harboring" a child away from its natural parent. This is but another way of expressing the meaning of "alienation of affections" and with respect to the parent-child relationship is identical to "alienation of affections". In the case at bar this is more particularly true under the Federal Rules of Civil Procedure, as discussed below in Section V.

III. HAVING FILED AN ANSWER DISPUTING MATERIAL FACTS IN A COMPLAINT, A DEFENDANT MAY NOT SEEK AND OBTAIN SUMMARY JUDGMENT ON THE GROUND THAT ALL MATERIAL FACTS ARE UNDISPUTED.

Summary Judgment under Rule 56, Federal Rules of Civil Procedure is predicated upon an absence of disputed facts. material to the outcome of a case. Defendants' motion for summary judgment asserted that there were no undisputed material facts. Plaintiffs' reply contained a clear statement of genuine issues of fact.

The basis of defendants' assertation was an alleged award of custody of the minor child of plaintiffs to defendant Eva Robertson Hinton by the Juvenile Court of Montgomery County, Maryland. Although this was alleged to have happened months prior to the filing of the complaint, neither defendant alleged this in answer to the complaint by way of avoidance of the complaint. This appeared for the first time in the joint motion for summary judgment. The reply to that motion

categorically denies that the Juvenile Court of Montgomery County made any award of custody to defendant Eva Robertson Hinton or to any other person or institution. (Appendix, p. 23, paragraph 6).

Summary judgment, if predicated upon an award of custody of plaintiff's minor child to defendant Eva Robertson Hinton by the Juvenile Court of Montgomery County, Maryland, was improperly entered, since there was no such award, as is well known to both defendants in this proceeding. Had such been true, it hardly would have been necessary for the General Counsel of Sidwell Friends School to have written to Eva Robertson Hinton's attorney on September 15, 1966, in effect asking that Eva Robertson Hinton file an action for custody in the District of Columbia Juvenile Court.

IV. ADDITIONAL DISPUTED FACTS WERE PRESENT OTHER THAN THE LEGAL CUSTODY OF PLAINTIFFS' SON, ALL OF WHICH PRECLUDED SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS.

Without dwelling at length upon the multitude of disputed facts in the case at bar, appellants respectfully represent that such can be summarized by the following question: Did John R. Hinton refuse to live with his parents because of the overt actions of defendants Eva Robertson Hinton and/or Sidwell Friends School? This is the issue that appellants seek to have resolved by a jury in the trial court.

V. REFUSAL TO GRANT LEAVE TO AMEND A COMPLAINT AFTER RULING AGAINST PLAINTIFFS ON MOTION FOR SUMMARY JUDGMENT WAS IMPROPER UNDER THE FEDERAL RULES OF CIVIL PROCEDURE AND WAS AN ABUSE OF DISCRETION BY THE TRIAL COURT.

Assuming, arguendo, that the trial court entered judgment against plaintiffs upon the narrow ground that no action lies in the District of Columbia for alienation of affections arising from the relationship of parent and child, such judgment was improper under the Federal Rules of Civil Procedure. Pennsylvania Railroad Company v. Musante-Phillips, Inc., (42 F. Supp. 340 (D.C., California) holds that upon a motion to dismiss a complaint must be sustained if there is any theory upon which liability can be based. The record does not disclose the basis for the holding of the trial court. If its holding was that the complaint should have been for "enticing and harboring" rather than for "alienation of affections", the ruling was improper, since there existed a theory upon which recovery could be predicated.

Plaintiffs moved for leave to file an amended complaint; this was opposed on the basis that plaintiffs had failed to amend prior to the filing of the defendants' motion for summary judgment and further than the action had been dismissed with prejudice. Thereupon plaintiffs filed for relief from the judgment of dismissal under Rule 60 (b) (6) of the Federal Rules of Civil Procedure. This was opposed on the ground that there had been no showing of "extraordinary" reason for such action. The trial court denied the motion for relief.

All of the foregoing is completely at odds with the well-established precept that leave to amend shall be freely and liberally granted under the Federal Rules of Civil Procedure, and was a clear abuse of discretion of the trial court.

CONCLUSION

Appellants pray that the ruling and judgment of the trial court be reversed, with costs to appellant, and that this case be remanded for trial in the United States District Court for the District of Columbia.

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Appeal No. 23,294

[illegible] C. Potter, Virginia S. Potter, Appellants

v.

Eva Rosalie Hunter, Howard Wayne Schoen, Appellees

Appeal From United States District Court
for the District of Columbia

LIST OF REPLIES

[illegible]

STATEMENT OF ISSUES PRESENTED *

In the opinion of appellees, the following are the issues presented for this Court:

1. Whether an action lies for alienation of affections of a minor child from his parents.

2. Whether the trial court was correct in awarding summary judgment in favor of appellees on the basis of the undisputed facts disclosed by the pleadings and depositions filed in the case.

3. Whether the trial court erred in refusing to permit appellants to amend their complaint after summary judgment had been granted.

* This case has not been previously heard by this Court.

INDEX

TABLE OF CASES

AUTHORITIES CITED

* Cases chiefly relied on are marked with asterisks.

STATEMENT OF THE CASE

Appellants filed suit in the United States District Court for the District of Columbia against appellees alleging alienation of affections by appellees of their minor son, John R. Hinton. Both appellees answered separately. Both denied that the complaint stated a cause of action and both denied the allegations of the complaint.

Depositions were taken by both sides. Appellant took the deposition of Mrs. Eva Hinton and appellees took the deposition of Frank Mills, former probation officer attached to the Montgomery County Juvenile Court. Thereafter, motions for summary judgment were filed by appellees. After hearing and consideration of supplemental memoranda, the motion for summary judgment was granted. Appellants moved for relief from judgment under Rule 60(b)(6) of the Federal Rules of Civil Procedure which was also denied. This appeal followed.

STATEMENT OF FACTS

Appellants (plaintiffs) are the parents of John R. Hinton, a minor now 20 years of age. Appellee, Eva Hinton, is the paternal grandmother of John R. Hinton and appellee Sidwell Friends School is a private educational institution where John R. Hinton was a student from 1963 until his graduation in June of 1967 (App. 2).

Appellants originally enrolled their son in Sidwell Friends School voluntarily (App. 2). While a student at Sidwell Friends School and while living with his parents, John Hinton came under supervision of the juvenile authorities for Montgomery County because he had run away from the home of his parents (plaintiffs) on several occasions (App. 52). In November of 1965 John Hinton was taken by his parents to live with his grandmother (appellee Eva Hinton). In February of 1966 appellants instructed their son to return to their home but he refused to leave the home of appellee Eva Hinton (App. 2-3).

In September of 1966 appellants instructed Sidwell Friends School not to permit attendance of the minor child unless and until the minor child returned home. Appellee Eva Hinton, however, arranged for John Hinton's continued attendance at the School (App. 3). The juvenile authorities in Montgomery County were advised that John R. Hinton had moved to his grandmother's house. The recommendation of the juvenile

authorities was that John Hinton should remain with his grandmother rather than returning to his parents' home (App. 56). The reasons for the recommendation of the juvenile authorities are set forth, in part, in the deposition of Mr. Mills formerly a provation officer with the Montgomery County Juvenile Court (App. 58-60).

In June of 1967, prior to graduation of John Hinton from Sidwell Friends School, appellants directed the School to refrain from issuing a diploma to the said John R. Hinton or releasing his academic record to any colleges. Appellee Sidwell Friends declined to follow these instructions and did award a diploma to John Hinton (App. 4).

On June 21, suit was filed against appellees for alienation of affections.

On this state of the record, appellees jointly filed a motion for summary judgment which was granted by the Court below.

SUMMARY OF THE ARGUMENT

It is well established in the District of Columbia that an action of alienation of affections is based on the loss of consortium between husband and wife. This Court has held that no action for alienation of affections can be maintained in this jurisdiction unless it arises out of the marital relationship.

The complaint does not state a cause of action for enticement or harboring the minor child since the complaint itself admits that the minor child was voluntarily placed with appellee Eva Hinton and was voluntarily enrolled in Sidwell Friends School. The complaint also admits that the minor child refused to return to his parents' home and does not allege that either the appellee Eva Hinton or Sidwell Friends School in any manner prevented the child from returning to the home of his parents.

Appellants also argue that the Court below should be reversed for failing to grant their motion for leave to amend their complaint. Obviously, however, in view of the allegations of the original complaint and in view of the deposition on file (App. 50-74), there is no theory on which appellants can maintain a cause of action against either of the appellees. It is quite obvious that the appellees followed the only responsible course of action available in the face of this unfortunate situation.

Since it is clear that no cause of action could lie against either of appellees on the basis of the facts disclosed by the pleadings and the depositions, it is clear that summary judgment is applicable. The fact that there may be controverted issues of fact has no bearing on the validity of granting summary judgment where, as here, such issues have no effect on the ultimate resolution of the case.

ARGUMENT

I. No Action Lies in the District of Columbia for Alienation of Affections of a Child

Many years ago this Court stated:

> "The gist of the action for the alienation of affections is said to be the loss of consortium--that is, the loss of the conjugal fellowship, company, cooperation, and aid of the husband or wife. Loss of consortium is the actionable consequence of the injury, and alienation of affections is a matter of aggravation." 1/

This basic pronouncement has been affirmed in later decisions. See Albert v. McGrath, 278 F.2d 16 (U. S. App. D. C., 1960). Appellants appear to urge that this Court should extend the right of action for alienation of affections to situations which do not involve the marital relationship. Since alienation of affections is based on loss of consortium, appellants must also urge that the right of action for loss of consortium should be extended. But this Court has refused to extend the right of action for loss of consortium beyond the marital relationship. In Pleasant v. Washington Sand and Gravel Co., 262 F.2d 471, this Court considered whether or not a child should have an enforceable claim for loss of a parent's consortium. After considering the contentions advanced by the parties, this Court concluded that it should not extend the right of action for loss of consortium beyond the marital relationship.

1/ Dodge v. Rush, 28 App. D. C. 149 at p. 152 (1906).

Consequently, it must be taken as settled that no cause of action lies in this jurisdiction for alienation of affections in any situation which does not involve the marital relationship. Appellants have sued for alienation of affections between parents and a child, and it is obvious that it cannot be sustained. None of the authorities cited by appellants have any bearing on this issue.

II. The Complaint does not State a Cause of Action for Enticement or Harboring

Another of appellants' contentions appears to be that the complaint, although stating on its face that it is a complaint for alienation of affections, also states a cause of action for the tort of enticement and harboring.

The essence of the tort of enticement or harboring is an active or affirmative effort by a defendant to take the child away from the parents' custody. 67 C.J.S. Parent and Child §101(2), p. 853. Kenney v. Baltimore, 61 A. 581; 101 Md. 490.

Here there was no enticement, no persuasion, and no forceable abduction. The child was voluntarily placed in the hands and care of his grandmother. When requested, the child refused to return home. This situation is similar to the facts involved in McEntee v. New York Foundling Hospital, et al., 194 N.Y.S.2d 269 (1959), cited by appellants, in which the complaint was held insufficient to sustain the cause of action.

In the McEntee case the Court pointed out that the complaint alleged voluntary placement of the child. The Court found that there was a hiatus in the factual background alleged as to whether the infant resided with plaintiffs when she was induced to run away and desert plaintiffs and held that enticement or harboring could not lie under the facts alleged. Appellee Eva Hinton did not entice the minor from his parents; they took him to her voluntarily.

Furthermore, as also pointed out in the McEntee opinion, the co-defendant, the Foundling Hospital, was accused of conspiring with the defendant for the purpose of preventing the infant from returning to her mother. With respect to the Hospital, the Court pointed out that the complaint is patently deficient since it fails to allege any tortious acts on its part.

With respect to the Sidwell Friends School, nothing is alleged in the complaint which would amount to a tort. It is alleged that the School required a medical examination and that the examination had been made without the consent of the parents. It is also alleged that the School, in the performance of its duty, granted a diploma to the minor even though the plaintiffs demanded that no diploma be given to their son. Neither of these acts are torts of any kind. Neither of them have any bearing on the cause of action for alienation of affections or on enticement and harboring.

Thus there is no allegation of facts in the complaint which sustains an action against the Sidwell Friends School.

It is thus apparent that the Court correctly grant summary judgment in that the complaint does not allege a cause of action under any theory against these appellees.

III. Summary Judgment is Properly Granted under these Circumstances

Appellants seem to contend that so long as there are any controverted issues of fact, it is improper to grant summary judgment. This overlooks the well-recognized principle that summary judgment is a proper remedy so long as there is no issue of fact which has any probative force as to a controlling issue. See Durasteel Co. v. Great Lakes Steel Corp., 205 F.2d 438, 441. Furthermore, the essence of the summary judgment procedure is to pierce through the pleadings and to assess the nature of the evidence to see whether there is a genuine need for trial. See Markwell v. General Tire and Rubber Company, 367 F.2d 748, 750 (C.C.A. 7, 1966). Here, the evidence of record consisting of the pleadings and the deposition of Frank Mills, the juvenile court officer, show the circumstances of the relationship between appellants and their son. It must be evident that neither of the appellees had anything to do with a feeling of hostility or lack of affection which had developed between

appellants and their son. To carry the case further and go through the embarrassment of a trial would be pointless. It was appellants' duty to produce the specific facts which they contend support their right to recover damages from either appellees. No such specific facts were produced in response to the motion of appellees and summary judgment is, therefore, appropriate.

IV. Trial Court Properly Denied Motion for Relief under Rule 60(b)(6)

Following the hearing on appellees' joint motion for summary judgment, the trial court granted appellants opportunity to submit supplemental memoranda in opposition to the motion for summary judgment. Opportunity was also afforded appellees to reply to the supplemental memorandum of appellants. Thereafter the Court granted summary judgment and appellants filed a motion for relief from the judgment under Rule 60(b)(6) of the Federal Rules of Civil Procedure. The Court properly denied appellants' motion.

The remedy under Rule 60(b) of the Federal Rules provides extraordinary relief and may be invoked only on the showing of exceptional circumstances. See John E. Smith's Sons Co. v. Latimer Foundry and Mech. Co., 239 F.2d 815 (C.C.A. 3, 1956). There were no exceptional circumstances in this case. Throughout the period of time during which

appellees filed their motion for summary judgment (March 24, 1969, App. 22), through the time that supplemental memoranda were filed on April 29, 1969, appellants could have filed a motion for leave to file an amended complaint alleging a different cause of action. Appellants did not choose to do so. It seems clear that one of the reasons they did not choose to amend their complaint was that the facts would not support an action for enticing and harboring which was the purpose of the amended complaint (App. 41).

Thus there are no unusual circumstances in this case warranting relief from summary judgment entered by the trial court. The facts disclosed by the depositions and the pleadings show the nature of the controversy and demonstrate there is no basis on which appellants can maintain any cause of action against either of appellees. Under these circumstances the Court was correct in granting the motion for summary judgment and denying the motion for relief under Rule 60(b)(6).

CONCLUSION

The action of the trial court in granting appellees' motion for summary judgment should be affirmed.

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Dated _____, 1969